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What Is Wrong with Character Evidence?

by
PETER TILLERS*

Introduction: Rethinking the Riddle of the Character Evidence Rule

The rule barring the use of character to show conduct—the “character evidence rule”—has undergone significant erosion in recent years. The rule also has been subjected to withering criticism. But the character evidence rule—which bars the “circumstantial” use of character—is not yet dead. Moreover, the character evidence rule still has many defenders. (Indeed, in the legal community the rule’s defenders seem to outnumber its critics.)

What is the future of the character evidence rule?

It is becoming increasingly apparent that the standard explanations and justifications for the character evidence rule are inadequate. This suggests that the character evidence rule may become a dodo. But it is premature either to celebrate or mourn the

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This essay is dedicated to Jesse Glendon Tillers and Lily Glendon Tillers.

My thanks go to Judge Jack Weinstein, Alex Stein, Craig Callen, Mary Ann Glendon, Miguel Mendez, Roger Park, and David Schum for their comments. I am particularly indebted to Miguel Mendez for calling my attention to the affinity between portions of my argument and the arguments of some personality theorists. I am also deeply indebted to Roger Park. He and I have exchanged sporadic e-mail messages during the past several years about the topic of character evidence. Even an inattentive reader will notice that many of the positions I take are similar to the positions that Roger Park has taken both in print and in conversation. His influence on my views about the character evidence rule has been, I believe, profound. I know of no adequate way to acknowledge the extent of that influence except in a note such as this. (I hasten to add that any errors in this paper really are my own. He provided the inspiration. It was my job to supply the perspiration.)

Although I have never met or spoken with Susan Marlene Davies, I would also like to acknowledge my debt to her. In her perceptive article on character evidence, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504 (1991), she uses social science literature, good logic, and just plain common sense to document and substantiate a good many of the kinds of points that I have tried to make in this paper. Although my own arguments do not rest on personality theory or empirical research in the social sciences, her excellent paper has relieved me, I believe, of the obligation to demonstrate that social science research is not *incompatible* with the positions I have taken in this paper. For that I am *immensely* grateful.

Finally, I am particularly grateful to Judge Weinstein for his comments, including his valuable reminder that trial judges are not gods and that they do not have divine powers of insight into the human soul.

death of the character evidence rule. One prominent observer, John Langbein, takes the position that rules of evidence are particularly hardy weeds that manage to survive even when there is no good reason for their continued existence.¹ But even if one's view of the law of evidence is not as caustic as Langbein's, it may be too soon to dance on the grave of the character evidence rule: even if good reasons for the character evidence rule are not apparent, such reasons may exist. Hence, this essay does not attempt either to defend the character evidence rule or to demolish it. It is, instead, an effort to "rethink"² the character evidence rule and the possible reasons for its existence.

In Part I of this essay, I explain why several common explanations for the character evidence rule do not work. In Part II, I consider the possibility that circumstantial character evidence is incompatible with the idea or ideal of human autonomy. After rejecting this possibility (but drawing some inspiration from it), I explain in Part III why it is *incorrect* to say that evidence of human character is generally inadmissible to show human conduct. Part IV of this paper develops my thesis that the conception of character as a bundle of traits is inadequate and that it is far better to think of character as the "animating spirit" or the "internal operating system" of a human organism. In the conclusion to this paper, I make some general observations about the character evidence rule.

In this paper, I take no position on the question of whether the character evidence rule is, on the whole, a good thing or a bad thing.

1. See John H. Langbein, *Torture and the Law of Plea Bargaining*, 46 U. CHI. L. REV. 3, 19-20 (1978). See also John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 300-06 (1978).

2. Although I do wish to recast or "reformulate" the problem of the character evidence rule, I do not claim that the ideas in this paper are revolutionary or even particularly original. Most of the ideas that enter our minds—particularly ideas about matters such as law and morals—have been thought many times before. See Mary Ann Glendon, *Tradition and Creativity in Culture and Law*, in FIRST THINGS 13 (Nov. 1992); JOHN HAUGELAND, *ARTIFICIAL INTELLIGENCE: THE VERY IDEA* 12 (1985) ("[I]nvention is often just a rearrangement (more or less dramatic) of previously available materials.").

I wish to emphasize that in calling for a reformulation of the character evidence rule riddle, I am *not* saying or intimating that there has been no fresh or important thinking about the character evidence rule in recent years. To the contrary, there has been a considerable amount. See Craig R. Callen, *Proving the Case: Character and Prior Acts: Simpson, Fuhrman, Grice, and Character Evidence*, 67 U. COLO. L. REV. 777 (1996). "Fresh thinking"—new theoretical speculation—is not the only thing we need. We also need, for example, careful empirical investigation, which requires imagination as well as diligence. Recent years have seen many valuable empirical studies have been done of various types of evidence. See Peter Miene, Roger C. Park, & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683 (1992) (evaluating juror use of hearsay evidence).

Instead, I describe some of the questions that need to be addressed before any radical surgery is performed on the character evidence rule. These questions surface if one conceives of character, not as a bundle of traits, but as the internal operating system, or animating spirit, of the human organism. The general theme of my essay is that *a true understanding of the character evidence rule is impossible without a true understanding of the character of human character.*

I. Character Evidence and the Usual Suspects: Irrelevance and Undue Prejudice

A. Character Evidence and the Principle of Relevance

A surprisingly common explanation for the character evidence rule is that the probative value of most character evidence is meager, practically non-existent, or vanishingly small.³ This is an inadequate explanation or justification for the character evidence rule.

(1) The Question of the "Logical Relevance" of Character Evidence

Although the "meager probative force" theory is an inadequate rationale for the character evidence rule, the explanation for the inadequacy of this rationale cannot be grounded in contemporary legal definitions of "relevance." Modern definitions of "relevance" such as the one given by Federal Evidence Rule 401 are extremely expansive. They generally provide that evidence is relevant if it has any probative force at all, regardless of how little. Practically all character evidence, when measured against this enormously liberal standard, is "relevant."⁴ However, though this fact—the almost indubitable fact of the "relevance" of character evidence—may reveal a great deal about definitions of relevance such as those found in Federal Evidence Rule 401, it tells us little or nothing about the merits or demerits of the claim that character evidence is made inadmissible because of its meager probative value. For even if we

3. This thesis is theoretically distinct from the argument that jurors or triers of fact tend to overestimate the probative value of character evidence. The alleged tendency of jurors or triers of fact to overvalue character evidence may occur even if it is supposed that character evidence has more than minimal probative value. *See infra* note 24. Nonetheless, most of the observers who express a concern about the overestimation of character evidence seem to be primarily worried about the exaggeration of the significance of evidence that they think has either very little or no probative value.

4. There is almost universal agreement about the general proposition that character evidence is "relevant" under liberal modern definitions of relevance. *See Harris v. State*, 567 A.2d 476, 482-84 (Md. App. 1989) (explaining that even inadmissible evidence may be relevant), *rev'd on other grounds*, 597 A.2d 956 (Md. 1991).

conclude that character evidence is, "technically speaking," relevant, we are free to conclude that character evidence generally or always has a meager amount of probative force.⁵ The fact of the "relevance" of practically all character evidence speaks principally to the serious limitations of the much-vaunted "modern" theory of "logical relevance."⁶

(2) *The Question of the "Legal Relevance" of Character Evidence*

"The fact is that the average person is able to explain, and even predict, the behavior of persons with a facility and success that is remarkable."⁷

The true thrust of the "meager probative force" rationale is not that character evidence is "logically irrelevant," but that the probative forces of character evidence is too meager to justify the costs associated with its admission. An earlier generation of scholars and legal professionals might well have said that character evidence is or ought to be inadmissible because it does not meet the standard of "legal relevance"—that it ought to be inadmissible because it does

5. The modern definition of relevance is so expansive that it can be difficult to imagine evidence that is truly irrelevant. See 1 WIGMORE ON EVIDENCE § 9 n. 1, at 657-58 (Peter Tillers rev. 1983) ("This expansive understanding of what it is that makes evidence 'relevant' makes it quite difficult to assert with any confidence that any evidence is irrelevant to anything" and careful analysis of "decisions that purport to exclude evidence for its irrelevancy usually serves to demonstrate that the supposedly irrelevant evidence was in fact excluded (or should have been) for reasons quite apart from irrelevance, such as undue prejudice or undue consumption of time."). The relevance of practically all evidence principally goes to show that bare, literal "relevance" is not sufficient to make evidence even presumptively admissible. As I said in 1983 about the relationship between rules such as Federal Evidence Rule 401 and Federal Evidence Rule 403, "[W]hat the Lord Giveth, the Lord Taketh." 1A WIGMORE ON EVIDENCE § 28, at 975 (Peter Tillers rev. 1983). See also CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 9 (2d ed., 1996) (using practically identical Biblical phraseology to describe the effect of the interaction of Rules 401 and 403). That is to say: Rules 401 and 403, when taken in combination, effectively require that admissible evidence have more than some barely perceptible amount of probative force.

6. See generally 1A WIGMORE, *supra* note 5, § 37.1, at 1005-06, § 37.4, at 1030-42. The difficulties with the "logical relevance" standard are discussed in considerable detail at various points in my revision of Wigmore's treatise. See 1 WIGMORE, *supra* note 5, § 9 n. 1, at 657-58, 663-664; 1A WIGMORE, *supra* note 5, § 28 n.1, at 968-969; *id.* § 37.2, at 1019-1025; *id.* § 37.4, at 1030-33; *id.* § 37.7, at 1089-95. (My analysis suggests that logic alone does not explain the emergence of the "logical relevance" notion; other factors—for example, perhaps the desire of legal professionals to give the appearance of preserving juror fact-finding prerogatives while in fact maintaining a system of extensive judicial control over juror fact-finding—were at work.)

7. PAUL M. CHURCHLAND, *Eliminative Materialism and the Propositional Attitudes*, in A NEUROCOMPUTATIONAL PERSPECTIVE: THE NATURE OF MIND AND THE STRUCTURE OF SCIENCE 1, 2 (1989).

not have more than the “bare minimum” of probative force that is required for admissibility.

There is one obvious but grave difficulty with this version of the “meager probative force” rationale for a prohibition against circumstantial character evidence:

*A considerable amount of character evidence has a substantial amount of probative value.*⁸

B. Undue Prejudice as a Result of “Sentiment”

The rule authorizing the exclusion of character evidence is sometimes rationalized as a special case of the general principle of “undue prejudice”—the principle that evidence, including relevant evidence, may be excluded as unduly “prejudicial.” One species of the undue prejudice notion focuses on the risk of “misdecision” that can be created by matters such as “sentiment,” “emotion,” and “passion.” This species of the prejudice principle has two distinct variants. The first variant focuses on the risk that jurors’⁹ emotions and passions will produce misdecision because of the tendency of emotion and its cousins to overwhelm or disable ordinary reason and judgment. The second variant emphasizes the risk that the personal sentiments of jurors—such as personal dislikes and hatreds—will induce them to refuse to do what the law requires them to do with the evidence that they have been given.

8. It may not matter—it probably does not matter—whether it is true that a “considerable” amount of character evidence has substantial probative value. Perhaps all that matters is that it is *sometimes* the case that character evidence has substantial probative value. This is arguably *all* that matters if trial courts have the ability to distinguish character evidence with an insignificant amount of probative value from character evidence with a substantial amount of probative value. If the administrative costs associated with making this distinction are not substantial and if trial judges can be trusted to make this sort of distinction consistently and fairly, the relative proportion of character evidence that does and does not have significant probative value is immaterial. It should be noted, of course, that rules such as Federal Rule of Evidence 403 give trial judges the job of making judgments about the magnitude of the probative value of particular items of evidence (as well as about the magnitude of various kinds of risks and costs that are associated with particular items of evidence). Hence, given Rule 403, one cannot easily defend a categorical rule solely on the ground that it (allegedly) removes the trial judge’s capacity to make “subjective” judgments about the probative value of evidence.

9. This section of the paper refers only to jurors. It is possible, however, that the undue prejudice principle—or at least some versions that principle—should apply in bench trials as well as in jury trials. See *infra* pp. 9-11. See also 1 WIGMORE, *supra* note 5, § 4d.1, at 221-28 (suggesting, *inter alia*, that exclusion of evidence for reasons such as undue consumption of time is appropriate in bench trials as well as in jury trials).

(1) *The Sentiment That Overwhelms, Corrodes, and Disables Reason: Sentiment as Brute Emotion or Passion*

One difficulty with the power-of-brute-emotion justification for the character evidence rule is that a considerable portion of inadmissible character evidence is unlikely to arouse swells of emotion that are strong or durable enough to impair significantly the ability of triers of fact to remember and reason about evidence by the time they retire to the jury room to deliberate; jurors generally have enough time to let their "brute" emotions subside before they must begin their deliberations.

A second difficulty is that much evidence that would be inadmissible character evidence if it were offered solely to show conduct in conformity with character is not barred by the character evidence rule if it is offered for another purpose. For example, evidence of a prior safecracking, though not admissible to show the defendant's propensity to break into safes and steal money, may be admissible to show that the defendant had the ability to crack the safe that he is now on trial for having cracked and looted. If the tendency of evidence of character to cloud reason with emotion were the true reason for the character evidence rule, evidence revelatory of character would be inadmissible regardless of the purpose for which it is offered.

A third difficulty is that the American character evidence rule ostensibly applies in bench trials as well as in jury trials.¹⁰

The fourth difficulty is that it is rather unclear what a brute emotion is. It is not completely obvious that the emotions ordinarily provoked by *courtroom evidence* (as opposed to those provoked by a matter such as a physical attack) can reasonably be characterized as "brute emotions," nor is it beyond doubt that the kinds of emotions that character evidence ordinarily evokes always or generally impede inferential performance. (It is even possible that "inflammatory" character evidence generally *improves* inferential performance—because such emotion-arousing evidence, by definition, tends to engage the *attention* of the trier or triers of fact.)

(2) *The Sentiment that Subverts and Nullifies the Authority of Legal Reason and Rules: Sentiment as Personal Preference*

The claim that the sentiment or feeling occasioned by character evidence has the capacity to lead a jury into error sometimes

10. See *infra* at 789.

amounts to the claim that character evidence may lead jurors to decide to resolve the dispute on the basis of their personal preferences—their “personal sentiments”—instead of on the basis of the authoritative legal rules and principles that they have been told that they are required to follow. The concern in this situation is that character evidence will induce the jurors to concentrate on their own preferences, sentiments, or feelings and that the jurors’ preoccupation with their own preferences may lead the jurors to decide—perhaps quite calmly and without any throbbing passion or emotion—to give effect to their own “personal” preferences rather than to the law’s mandates and requirements. The danger is that jurors will deliberately decide to do what they have been told not do.¹¹

The second variant of the sentiment-based rationale involves, in short, the alleged problem of “jury nullification.” If it is at all appropriate to speak of juror passion or sentiment when there is juror misuse of evidence and facts because of juror or jury nullification, the kind of passion or sentiment involved may very well be a “bloodless” or “dispassionate” kind. This is because, by hypothesis, the reason for the jury’s misdecision in such a situation is not rooted in the cloud that emotion throws over reason. The theory here is, in effect, that the jury *decides* or *chooses* to make improper use of the evidence before it.

That is the theory.

Does it hold water?

No.

There are two or three principal reasons for saying that the risk of jury nullification does not explain the character evidence rule. First, the character evidence rule is thought to apply in bench trials as well as in jury trials.¹² Second, one might question the assumption that jurors are more prone than judges to engage in “nullification.”¹³

11. This theory of the prejudicial nature of character evidence does not depend on the supposition that character evidence has the capacity to impair the ability of jurors to reason and deliberate about evidence and facts. This theory instead rests on the premise that character evidence inclines jurors to use the *wrong* reason and the wrong set of preferences; this theory asserts that character evidence will lead jurors to substitute their preferences for the law’s “preferences”—not because jurors who are confronted with character evidence cannot reason in a competent fashion about evidence, but, rather, because jurors who are confronted with character evidence are likely to believe that their personal preferences are better than the law’s preferences and are likely to give effect to their own preference rather than the law’s supposedly mandatory and authoritative preferences.

12. See *infra* p. 9 and the discussion *supra* note 9.

13. It is generally thought that *judicial* nullification is rare. However, it is not unknown. See Jan Hoffman, *Judge Acquits Abortion Protesters on Basis of Religious Beliefs*, N.Y. TIMES, Jan. 19, 1997, at 25; *A Ruling Too Far*, NAT’L L. J., Feb. 3, 1997, at

The third alleged infirmity of the nullification rationale is the most cogent: despite the existence of the character evidence rule, much evidence *revelatory* of character is considered admissible and is often admitted if it is offered to show matters such as “intent,” “opportunity,” and other matters apart from “conduct in conformity with character.” Were it really the case that evidence revelatory of character tends to make a jury ignore the law’s preferences and substitute its own, this risk or tendency would exist when such evidence is admitted even for a “limited” and “non-character” purpose. The nullification theory, therefore, does not explain the character evidence rule.

C. Prejudice Due to Misestimation and Exaggeration of the Probative Value of Character Evidence

Another possible rationale for the character evidence rule—a rationale said to be championed by Wigmore—is that jurors are particularly prone to give character evidence more weight than it deserves.¹⁴ I will refer to this as the juror-inflation-of-probative-value rationale for the character evidence rule—or the “JIPV” rationale, for short.

The JIPV rationale for the character evidence rule is not necessarily equivalent to the “corrosion-of-inferential-reasoning-capacity-due-to-emotion-and-passion” rationale described in Part I.B.1, *supra*. While it is true that passion may lead to the misestimation and exaggeration of the probative value of character—because of the destructive effect that passion and emotion can have on the capacity of jurors to reason—the JIPV rationale asserts that jurors, whether or not impassioned, are particularly prone to misestimate and overestimate the probative value of character evidence.

The JIPV thesis faces several difficulties. One difficulty is that while some of the proponents of this thesis invoke the authority of Wigmore to support the proposition that jurors and juries simply are not very good at assessing character evidence and have a special propensity to exaggerate the probative value of character,¹⁵ Wigmore

A18: Otto G. Obermaier, *Second Circuit Court of Appeals Tries to Nullify Jury Nullification*, N.Y.L.J., July 7, 1997, at 7. I am inclined to think (but I cannot prove) that judges do “nullify” the law on a fairly regular basis, but that they do so in subtle and disguised ways—for example, by excluding evidence for reasons that they themselves think are incorrect or by “interpreting” the law in ways that they believe are incorrect.

14. See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

15. The Supreme Court itself did this some time ago in *Michelson*, 335 U.S. at 475. There have been other sinners. See, e.g., *Roberson v. State*, 218 P.2d 414, 423 (Okla. Crim. App. 1950).

himself rather clearly said that *both* judges and jurors tend to exaggerate the probative value of character evidence.¹⁶ So Wigmore embraced the *JJIPV* rationale for the character evidence rule—judge-and-juror-inflation-of-probative-value (of character evidence)—rather than the *JIPV* rationale—juror-inflation-of-probative-value.

A second and more substantial difficulty with the JIPV theory is that the character evidence rule ostensibly applies in bench trials as well as in jury trials. But perhaps this is not a fatal difficulty because perhaps it is true, as some observers claim, that the character evidence rule, though nominally applicable in trials without a jury, is effectively relaxed—and thereby eviscerated—in bench trials.¹⁷ Although I am not fully convinced that the *relaxation* of the character evidence rule in bench trials amounts to its *evisceration*,¹⁸ it is not important that this particular question be resolved here and now. There is a more fundamental difficulty with the JIPV rationale, one that does not depend on the question of the extent of the relaxation

16. See 1A WIGMORE *supra* note 5, §58.2, at 1212 (“The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited and either allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation.”). Cf. *id.*, §57, at 1185 (“But, as a pure question of policy, the [character evidence] doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish not because our victim is guilty this time but because he is a bad man and may as well be condemned now that he is caught is a tendency that cannot fail to operate with any jury, in or out of court.”).

17. See Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. REV. 1003, 1008-09 (1984) (“Objections to the use of character evidence are largely ignored when a case is tried to a judge. Although the general rule is that the jury trial system of evidence governs trials to the court, the rules are often relaxed when the judge sits as the trier of fact. The reason is that the rules of evidence are viewed as the product of the jury system—rules designed principally to protect lay jurors from the prejudicial effects of unreliable evidence.”) (footnotes omitted).

18. See generally 1 WIGMORE, *supra* note 5, §4d.1, at 221-28 (saying that although rules of evidence are relaxed in bench trials, it is an exaggeration to say that rules of evidence do not apply in bench trials). See also *State v. Forsland*, 326 N.W.2d 688 (N.D. 1982) (specifically discussing nonjury character of trial and special problems of enforcing proscriptions on uses of evidence in bench trials, making clear that character evidence rule must be applied in bench trials). See also 1 WIGMORE, *supra* note 5, at 227 (“rules regarding character evidence are routinely applied in criminal cases”) (citing *State v. Jost*, 241 A.2d 316, 323 (Vt. 1968) (reversing conviction because of improper admission and use of character evidence against a criminal defendant in a nonjury saying, “[c]haracter is never an issue in criminal proceedings unless and until the accused makes it so at trial.”)).

Even if it is true that admissibility decisions in bench trials are effectively insulated from appellate review, it does not necessarily follow that trial judges in bench trials will routinely disregard rules of evidence such as the character evidence rule. If trial judges believe they are obligated to follow the character evidence rule in bench trials, they may do so even if they think they can “get away” with not doing so.

of the character evidence rule in bench trials.

The third and most fundamental difficulty with the JIPV rationale is that the assumption that jurors, rather than judges, are particularly prone to overestimate the probative value of character evidence is unwarranted. There is no good reason to believe that a single judge, who is likely to be relatively isolated and separated from ordinary life and ordinary people by virtue of her professional education and professional position (a good many people seem to think that one of the implicit *purposes* of legal education is to make law students and lawyers less human and humane), is to be better qualified than a jury of twelve, eight, or six people, drawn from a cross-section of the community and having a variety of backgrounds and experiences, to make sound inferences about the probative force of human character.¹⁹

It is possible that by talking about the abilities of juries and jurors I am riding (and beating) the wrong horse. Perhaps the way to understand the IPV thesis—the “inflation of probative value” thesis—is not to read it as the JIPV thesis—“juror-inflation-of-probative-value” thesis—but, as Wigmore suggested, as the JJIPV thesis—“judge-and-juror-inflation-of-probative-value” thesis—or, alternatively, as the EIPV thesis—the thesis that *everyone* does it. This strikes me as the better and more charitable interpretation of

19. See 1 WIGMORE, *supra* note 5, § 10a n.22, at 688 (“It is sometimes said that the superior ‘experience’ of the trial judge warrants the assumption that the trial judge may better estimate the probative value of evidence. See, e.g., CLEARY, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE §185 (2d ed. 1972). . . . But the claim that the judge has superior experience or insight is usually simply gratuitous and unsupported. How does sitting in a courtroom, as opposed to, for example, working in a factory or raising a family or anything else confer such superior experience and insight? Might one not say with equal force that courtroom ‘experience’ or legal practice or training distorts insights into human motivation and character?”). See also Roger C. Park, *Character Evidence Issues in the O.J. Simpson Case—or, Rationales of the Character Evidence Ban, with Illustrations from the Simpson Case*, 67 U. COLO. L. REV. 747, 770 (1996) (“In general, juries should have the authority to decide questions of fact in criminal cases. Group fact-finding by a body relatively untainted by self-interest is likely to be more accurate, under the peculiar conditions of a criminal trial, than fact-finding by a single judge.”) (footnote omitted).

A substantial body of research in social science supports the view that jurors generally do an excellent job of assessing evidence. See REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (1983); Michael J. Saks, *Small-Group Decision Making and Complex Information Tasks*, Report to Fed. Jud. Center, 1981. Although I take comfort in that literature, I do not rely on it. I simply believe that jurors—particularly juries—are better able than judges to assess evidence. Common sense suggests that a group of conscientious and ordinary people is particularly well-qualified to make judgments about the probative force of matters of common experience such as human character. This common sense should be abandoned only in the face of compelling scientific evidence to the contrary.

the IPV thesis.

Is it possible that *this* thesis—that all human beings and all triers of fact, whether judges or jurors, tend to misestimate and exaggerate the probative value of character evidence—justifies the character evidence rule?

I think not.

The thesis that both judges and jurors regularly exaggerate the value of character evidence is reminiscent of the Kahneman-Tversky thesis that ordinary people commit a large variety of inferential blunders and suffer from a wide variety of cognitive illusions.²⁰ Perhaps this similarity should sound a note of caution. The Kahneman-Tversky thesis came out in a blaze of glory, and many people were apparently initially persuaded that the general thrust of the Kahneman-Tversky thesis—if not its every detail—was correct. Over time, however, a substantial number of informed observers have questioned the hypothesis that ordinary people tend to be inferential morons.²¹

There is good reason to be extremely suspicious of claims that *all* people—or practically²² all people, in any event—are incapable of judging the true value of character evidence. One wonders, for example, how observers such as Wigmore—who are themselves also only human—knew that trial judges and jurors tend to make more out of character evidence than they should. To know when character evidence is being given more weight than it deserves requires that one know the true weight of the evidence. Were observers such as Wigmore “well-positioned” to make judgments that particular trial judges or particular juries in particular cases gave character evidence more weight than it was worth? Is it not likely that the trial judges and juries in any such cases had more detailed knowledge of the character evidence in the case and its larger evidentiary context than did observers such as Wigmore, whose knowledge of such evidence

20. See JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

21. See L. Jonathan Cohen, *Can Human Irrationality Be Experimentally Demonstrated?*, 4 BEHAV. AND BRAIN SCI. J. 317 (1981); L.L. Lopes, *The Rhetoric of Irrationality*, 1 THEORY AND PSYCHOL. 65 (1991); Gerd Gigerenzer, *How To Make Cognitive Illusions Disappear: Beyond ‘Heuristics and Biases’*, in 2 EUR. REV. OF SOC. PSYCHOL. 83 (1991); Jonathan J. Koehler, *The Base Rate Fallacy Myth*, 4 PSYCHOL. 49 (1993); Jonathan J. Koehler, *The Base Rate Fallacy Reconsidered: Normative, Descriptive and Methodological Challenges*, 19 BEHAV. AND BRAIN SCI. J. 1 (1996). See also the “peer commentary” on Koehler’s “Base Rate” article, 19 BEHAV. AND BRAIN SCI. J. at 17-41, most of which agrees with the thrust of Koehler’s critique of the Kahneman and Tversky view of the way that ordinary people use and misuse “base rate” information.

22. This qualification is necessary if one wishes to avoid the Cretan Liar problem: an observer may want to say that practically all people are morons but he puts himself in an awkward position if admits that he is also a moron.

was probably based largely on second-hand and incomplete accounts such as appellate opinions and newspaper articles? Or did they instead simply assume that *participants* in cases and controversies—participants such as trial judges and jurors—are particularly prone to misjudge the value of character evidence? If that was the implicit assumption, was it correct? Why should *non-partisan* participants in trials—participants such as trial judges and jurors—have a special proclivity to inflate the probative value of character evidence? Or did observers such as Wigmore instead rely on general assumptions about human nature, in particular on the assumption that people in general tend to misjudge the probative value of character evidence?²³

I am not convinced that there are satisfactory answers to such questions. But in my mind there is an even more fundamental difficulty with the EIPV thesis—the thesis that (practically) everyone has a tendency to inflate the probative value of character evidence. Its underlying premise—the generally weak probative force of character evidence—is either false or an oversimplification. As I stated in response to the “meager probative force rationale” for the character evidence rule, character evidence is often very probative.

This simple proposition devastates the EIPV thesis—and the JIPV thesis as well. Suppose that character evidence ordinarily has a substantial amount of probative value. Now consider whether it would still make sense to say that triers of fact tend to overestimate the value of probative evidence. The possibility that the proposition is true theoretically still exists: it *is* logically possible to exaggerate the probative value of extremely probative evidence. But if it is true that triers of fact are *generally* good at performing inferential tasks, as our system of factual adjudication necessarily assumes, there is little reason to credit the argument that triers of fact are particularly prone to overestimate the value of *character evidence*. The more plausible and parsimonious thesis is that when triers of fact accord character evidence substantial weight, they do so for good reason.²⁴

23. Apart from these questions concerning the basis of common declarations about the alleged incapacity of judges and jurors to make sound judgments about the probative value of character evidence, one might wonder whether judges and jurors are incapable of self-correction—that is, whether judges and jurors, if told or reminded that there is a danger of exaggerating the force of character evidence, would be unable or unwilling to take adequate steps to prevent themselves from exaggerating the significance of any character evidence that they might be allowed to see.

24. It is arguable that the case for the exclusion of character evidence because of the tendency of triers of fact to exaggerate the force of such evidence becomes less compelling and more problematic if one believes that character evidence generally has a great deal of probative value, though not as much probative value as judges and jurors tend to think. It is not entirely clear, however, that this particular argument, common in the context of Rule 403 assessments, holds water. A plausible argument can be made that

There is no good reason to treat triers of fact as inferential idiots.²⁵

II. Human Character and Human Autonomy

A. The Notion of Autonomy in General

Although the concept of human autonomy plays a prominent role in fields such as substantive criminal law,²⁶ that concept rarely figures in discussions of the character evidence rule.²⁷ In the course of

any demonstrable exaggeration of the probative value of any evidence—regardless of the extent of the “real” probative value of such evidence—generates an equal risk that the trier of fact will find that legally-required probability exists when in fact it does not exist or, if the character evidence is used negatively, that a legally-required probability does not exist when in fact it does.

An exception applies, however, when the evidence in question is so strong that, taken by itself (or, in any event, with practically uncontroverted facts), it surpasses the legally-required probability standard (or, if used negatively, the character evidence in question taken practically by itself negates the legally-required probability of some fact in issue).

25. If it is said that ordinary people are no good at judging evidence and probabilities, the proper rejoinder is always, “Compared to what?” The bare conclusion that ordinary people make errors in reasoning about evidence, facts, and probabilities is both unsurprising and uninteresting.

26. See, HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 132 (1968) (“We must put up with the bother of the insanity defense because to exclude it is to deprive the criminal law of its chief paradigm of free will. The criminal sanction . . . does not rest on an assertion that human conduct is a matter of free choice; that philosophic controversy is irrelevant. In order to serve purposes far more significant than even the prevention of socially undesirable behavior, the criminal sanction operates *as if* human beings have free choice.”)

27. Courts today rarely if ever suggest that the character evidence rule owes its existence to a concern for human autonomy. Moreover, very few legal scholars have ever suggested that human autonomy may be the foundation of the character evidence rule. I believe I am one of a very few observers ever to make such a suggestion. See 1A WIGMORE, *supra* note 5, § 54.1, at 1151. Talk about autonomy has occasionally surfaced in discussions and debates about the rape victim shield laws. See Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 563 (1993); Richard A. Wayman, Note, *Lucas Comes to Visit Iowa: Balancing Interests Under Iowa's Rape-Shield Evidentiary Rule*, 77 IOWA L. REV. 865, 894 n. 243 (1992); Sakthi Murthym, Comment, *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent*, 79 CAL. L. REV. 541, 552 (1991); Kit Kinports, *Evidence Engineered*, 1991 U. ILL. L. REV. 413, 425, 438; Harriett Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 776 (1986); 1A WIGMORE, *supra* note 5, § 62.1, at 1327. The discussion there, however, focuses on treating women as free to engage in certain types of sexual behavior. It does not address the question of human autonomy in general.

The issue under discussion here—the possible influence of the general notion of human autonomy on the character evidence rule—does seem to be unambiguously similar

a renowned discussion of the character evidence rule, however, Justice Benjamin N. Cardozo said, "In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar."²⁸ This comment suggests, though it was probably not designed to assert,²⁹ that the notion of autonomy has something to do with the character evidence rule. But, regardless of whether any American judge, law maker, or legal scholar has ever attempted to use autonomy to justify or explain the character evidence rule, might autonomy do so? This is the question I will discuss in this section. Before I do so, however, I need to make a distinction between two versions of the notion of autonomy and, thus, between two types of arguments based on the notion of autonomy.

Autonomy may be seen either as an ideal or as a fact. Each conception generates a different argument. An argument appealing to the ideal of autonomy has a prescriptive, moral, or normative character; it favors the character evidence rule on the ground that the rule reflects how human beings should work. Such an argument is aspirational. An argument appealing to the fact of autonomy, by contrast, is a "practical", or "realistic" argument. It defends the character evidence rule on the ground that the rule accurately reflects how human beings in fact work.³⁰

The bulk of this part of the paper discusses a "prescriptive" version of an autonomy-based argument for a prohibition against the use of evidence of character to show conduct. The very last section

to the notion of autonomy that comes into play in some discussions of substantive criminal law. In those discussions it is sometimes said that it is important to punish people for misconduct because it is important to treat people (including wrongdoers) as autonomous beings who are capable of self-determination. See PACKER, *supra* note 26. This is very much the notion of autonomy whose implications for the character evidence rule I am exploring here.

28. *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930).

29. Cardozo's rhetoric about starting afresh seems to have little to do with the idea of autonomy. The thrust of Cardozo's argument in *Zackowitz* seems to be that triers of fact are likely to let their emotions get the better of them and that they are likely (therefore?) to overestimate the probative value of character evidence. See *id.* at 468. After using the fresh start language, Cardozo proceeds to say, in the same paragraph, that the "law is not blind to the peril to the innocent if character is accepted as probative of crime," *id.*, and he concludes by approving Wigmore's condemnation of character evidence because of the "tendency of the tribunal . . . [to] give excessive weight to the vicious record of crime" *Id.*

30. In some quarters—particularly in social science, it seems—it is common to segregate theories into normative theories and descriptive theories. This taxonomy does not work well here, principally because the "practical" theory that I describe is not (as yet) a purely "descriptive" theory, but it is also not a purely prescriptive or normative theory. There is something missing in the traditional taxonomy of types of theories. See Peter Tillers & David Schum, *A Theory of Preliminary Fact Investigation*, 24 U.C. DAVIS L. REV. 931, 1010-12 (1991).

of this part of the paper has a very brief discussion of a "realistic" version of an autonomy-based argument in defense of the character evidence prohibition.

B. The Character Evidence Rule: An Appropriate Expression of the *Ideal* of Human Autonomy?

Roughly two hundred years ago Immanuel Kant argued (at great length) that the principle or ideal of human dignity requires that people be treated as autonomous creatures who are capable of determining their own actions.³¹ I will refer to this theory, from time to time, as the "VoA" theory—the "value of autonomy" theory.

This VoA thesis of an intimate or necessary connection between dignity and autonomy still commands respect in a good many quarters.³² Let us suppose that this thesis or hypothesis also commands *your* respect and mine. Hence, let me assume for now that all of us assent to the following two propositions:

(i) human dignity is itself an ideal, value, or norm that the law is required to respect (and also, perhaps, "reinforce" and "support"), and

(ii) to support the ideal of human dignity, law and society must treat human beings as autonomous and self-governing creatures.

Having established (somehow)³³ the value of human autonomy, and having also established (somehow)³⁴ the importance of having

31. Kant made this argument on numerous occasions. For an excellent summary of Kant's philosophy see the entry for Immanuel Kant in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 398 (Robert Audi ed., 1995).

32. The type of VoA theory described in the text appears most frequently in theorizing about substantive criminal law and criminal responsibility. In that context it is often said that it is important for the law to treat human beings as autonomous beings who are capable of determining their own actions. See PACKER, *supra* note 26.

33. The possibility of a logical demonstration of the importance of the value of autonomy is beyond the scope of this paper.

34. It should be noted that the alleged importance of having the law "treat" human beings as autonomous creatures does not follow *directly* from the premise that human autonomy is an important value or an overriding value. It is not immediately apparent that the law's failure to treat human beings as autonomous creatures abridges the value of human autonomy. For example, one might adopt the Pietistic position that human freedom and worth lie solely in the workings of the inner human heart or soul and that no "external" actions or pains can possibly abridge the worth, dignity, or freedom of the human soul. Alternatively, one might take the position that the content of human law is immaterial because, whatever that content might be, human beings have the capacity to make free choices and decisions within the constraints and limitations (however severe) that the law imposes. In short, one must give some reason for claiming that the presumed value of human autonomy has specific implications for the way that law deals with human beings. Here again, however, the question of the nature of this link lies far beyond the scope of this paper.

the law *treat* human beings as autonomous creatures, one might undertake to demonstrate that the character evidence rule is a necessary legal doctrine or, in any event, a useful or appropriate one. This argument would begin with the claim that the use of character evidence to show conduct is inconsistent with the principle of autonomy because to allow the use of character to show conduct effectively and publicly embraces the proposition that people's conduct can be caused, not by themselves, but by their character. Hence, the law should outlaw the use of character to show conduct because by doing so the law commits itself to the proposition that character does *not* cause conduct, a position consistent with the ideal of autonomy.

The "value of autonomy" argument for the character evidence rule that I have just described presupposes that the use of character *evidence* is incompatible with the morally mandated (but possibly untrue) premise of human autonomy. This presupposition seems to depend on two further presuppositions, which are as follows:

(i) the use of character as *evidence* implies that *character* causes people to act the way that they do, and

(ii) people are not autonomous, or self-governing, if their character causes them to act the way that they do.

Now that we have the VoA theory before us, let us consider whether this theory holds water. Let us consider, in particular, three possible rejoinders to the argument that the use of character as evidence contravenes the morally mandated premise or ideal of human autonomy. In so doing, let us see what (if anything) these rejoinders tell us about human character.

REJOINDER NO. 1: RELEVANCE AND CAUSALITY: RELEVANCE DOES NOT IMPLY CAUSATION.

The VoA argument against character evidence implicitly but necessarily rests on the proposition that the relevance of character to behavior implies that character causes behavior. Were society to embrace character evidence, the VoA theory posits, society would embrace the notion that human beings are automatons

The VoA theory as I have just described (and refined) it probably raises any number of issues and objections, but at this point I want to limit discussion to just one particular objection, or rejoinder, to the VoA argument in favor of the ban against character evidence. This rejoinder directly attacks the proposition that any supposition of the *relevance* of character to behavior implies that character *causes* behavior. It maintains character may be a basis for a valid inference about behavior yet not be a cause of behavior.

This rejoinder questions the connection between relevance and causality. It proposes that it is possible for an event or state of affairs to serve as a sign, indicator, or evidence of another event or state of affairs even if there is no causal connection or connections between the state or event that serves as a sign of another state or event and the state or event whose existence is suggested or shown by the state or event that serves as a sign.

The thesis that relevance does not imply causation may seem pertinent to an assessment of the VoA thesis of a necessary conflict between circumstantial character evidence and the value or norm of human autonomy. For if it is in fact true that one "state of the world" can serve as a sign of another state of the world in the absence of any causal relationship between those two states, there appears to be a logical possibility that "character" can serve as evidence of "behavior" even if character has no causal relationship (either direct or indirect) with behavior. Thus, as applied to the phenomenon of character evidence, the first possible explanation for the inability of the VoA thesis to justify a legal prohibition against the "circumstantial" use of character evidence is that the ability to use character to predict or infer behavior does not necessarily imply that character has a causal connection to the behavior that it predicts or suggests.

I regret to say that the VoA argument for the prohibition against character evidence cannot be disposed of this easily. For if one undertakes a careful analysis of the thesis that something can be relevant to the proof of an event without having caused the event, one quickly reaches the conclusion that the question of whether relevance implies causation is far more complicated than the arguments sketched thus far suggest. One can concede, for example, that an event serving as evidence can postdate the event for which it is evidence and yet insist that there must be a causal link between the later event and the event that it is thought to evidence. One might argue, for example, that the later event serves as evidence of the earlier event if and only if the later event is caused (directly or indirectly) by the earlier event. More generally, one might argue that any two events that have no causal connection can have, in the nature of things, only a coincidental connection and that a purely coincidental connection can never have—in the nature of things—any probative force.

Quite apart from these general considerations, the rejoinder based on the possibility-of-relevance-without-causation seems to have a vicious failing in the present context: it seems to be immaterial to the VoA argument for the *character evidence rule*. Even if it is possible for other kinds of evidence to be probative of a hypothesis in

the absence of a causal connection between the evidence and the hypothesis, *character evidence* seems relevant and probative precisely because, only because, and only when there is a belief in the existence of some kind of a causal link between character and behavior. We may think, for example, that character evidence is relevant because we think that a certain kind of character trait makes certain kind of behavior more probable. Hence, whatever may be said of *other* evidence of behavior—that is, even if *some* evidence may be relevant to behavior without having a causal connection with it—the relevance of *character* evidence does seem to depend on our judgment or belief that character does have a causal link with behavior.

My analysis here suggests that the relevance-without-causation thesis is not a valid ground for rejecting a normative VoA rationale for the character evidence rule. But my analysis has suggested something else. The relevance-is-possible-without-causation rejoinder to the VoA theory might make an observer object that *character* has a causal connection with behavior. This hypothetical observer might reason along the following lines:

Well, if I am inclined to think that character evidence is relevant, it must follow that I also believe that character influences behavior. In any event, *I* believe that a person's character can influence that person's behavior and I can readily imagine situations in which I think character evidence is relevant precisely because and only because I believe that.

As I shall shortly show, my hypothetical observer exaggerates a little: it is not true that if one thinks that character and behavior are causally connected, one is compelled also to believe that character causes or influences behavior.³⁵ Nonetheless, my hypothetical observer does make an important point: it is both possible and probable that character "causes" or influences behavior. This point, which is practically a truism,³⁶ warrants special emphasis.

35. See *infra* pp. 19-26 (discussing rejoinder No.2).

36. I readily grant that the proposition of the possible influence of character on conduct is practically a truism. There are two reasons why I am happy to make this concession. First, the proposition that character may cause or influence behavior is a crucial part of my general argument; it is a fact that I claim must be carefully taken into account in any "reconceptualization" of the character evidence rule. Second, it is no reproach to a theory to say it rests on truisms. Quite often the novel thing about a theory or a theoretical perspective is its elaboration of the implications of "common sense" or "self-evident" truths. Theorists have reason to be pleased if other observers believe that their theories rest on practically unshakable foundations.

REJOINDER NO. 2: DIRECT AND INDIRECT CAUSATION: IF THERE IS A CAUSAL CONNECTION BETWEEN EVIDENCE AND HYPOTHESIS, THE CONNECTION BETWEEN EVIDENCE AND HYPOTHESIS (AND BETWEEN CHARACTER EVIDENCE AND THE HUMAN CONDUCT IN ISSUE) CAN BE INDIRECT.

Another possible rejoinder to the VoA rationale for the character evidence rule challenges the VoA theory's hypothesis that a belief in the relevance of character evidence logically implies or entails the belief that character causes or influences conduct. This attempted rebuttal maintains that even if one believes that evidence has probative force only because it points to a cause and effect relationship—if one makes the judgment that “character” is indicative of “behavior”—it does not follow that one must reach the conclusion that “character” causes “behavior.” It is possible that the causal connection between evidence such as “character” and a hypothesis such as “behavior” is indirect. Thus, even if there must be a causal connection between evidence and hypothesis, it is possible that the evidence is causally connected to some other variable, which may be a “hidden” or “omitted variable,” which is in turn connected to the hypothesis or possible fact.

Thus, instead of Scenario 1 in Figure 1,

C



B

FIGURE 1

Where

C = character (tendency to kill)

B = behavior (killing of V, a Black man)

you might have Scenario 2 in Figure 2,

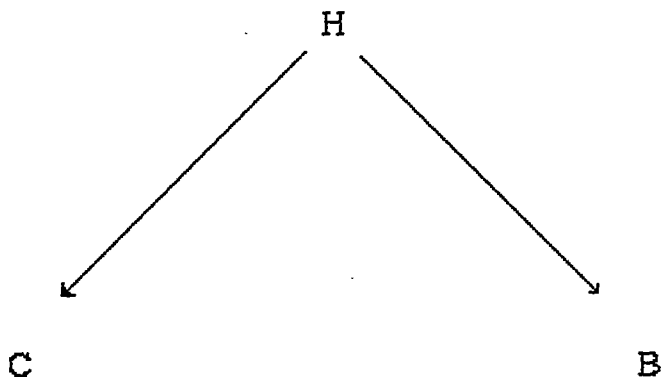


FIGURE 2

Where H = hatred or animus toward Blacks

In Scenario 2 the actor's character and his killing of V are thought to have a common cause, the actor's hatred of Blacks.

There are possible scenarios in addition to those shown in Figures 1 and 2. For example, you might have the scenario (Scenario 3) depicted in Figure 3:

H



C



B

H = hatred

C = character

B = behavior

FIGURE 3

In Scenario 3 hatred of Blacks generates a propensity to kill, which generates the killing of V. In this scenario, however, character remains an immediate cause of the actor's behavior.

Another possibility is Scenario 4 in Figure 4.

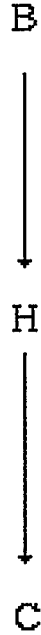


FIGURE 4

In this (fantastic) scenario **B**, the actor's killing of a Black man generates **H**, a hatred of Blacks in the breast of the actor, which in turn generates, or causes, **C**, a propensity to kill.

Scenarios 2 through 4 (in Figures 2 through 4 above) are meant to support the thesis that even if one assumes that there is a causal nexus between character and conduct, it does not follow that character causes behavior. But Scenarios 2 through 4 fail to do the job expected of them. Scenario 3, of course, misses the mark because in that scenario character remains a direct cause of behavior. Scenarios 4 and 2, however, also fail, but for somewhat different reasons. The trouble is that Scenario 4 proves too little while Scenario 2 proves too much.

Consider Scenario 4. This scenario suggests the possibility that character and hatred, instead of being the causes of the act or behavior in question, are the effects of the act. The trouble with this effort to bolster rejoinder number 2 is that Scenario 4 proves too little: a concession that Scenario 4 is *possible* falls short of showing that matters such as character and hatred cannot be causes rather than effects. Hence, Scenario 4 fails to determine the basic foundation for the VoA argument that law and society must outlaw the use of character evidence. Scenario 4 merely requires a slight modification in the VoA thesis, which must now read: law and society must ignore human character when it is an antecedent cause, rather than an effect, of human behavior.

Now consider again the chain of reasoning depicted in Scenario 2 in Figure 2, where hatred **H** is the "immediate" cause of behavior, and where character **C**, along with behavior **B**, is one of the effects of the actor's hatred:

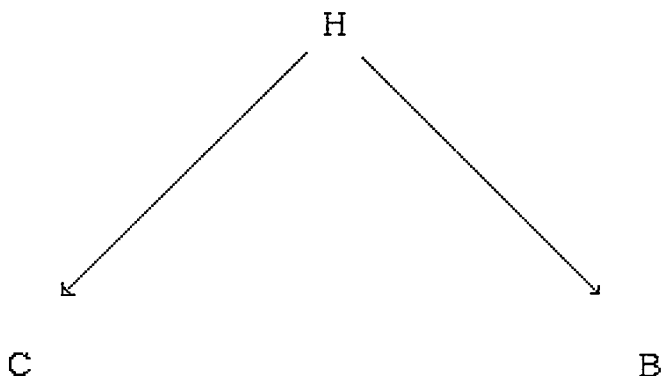


FIGURE 2

Where B = behavior, H = hatred, and C = character

Scenario 2 does not relieve the actor from the “tyranny” of having his behavior be caused or influenced by his character. But Scenario 2 substitutes the “causal tyranny” of character with another: the causal tyranny of hatred.³⁷ Scenario 2 reveals that matters in addition to character can cause or influence human conduct. Thus, although Figure 2 depicts a situation in which a human actor’s autonomy is not abridged by the influence or power of character C, Figure 2 does *not* depict a situation in which the actor is altogether free of causal influences or constraints; the actor in Scenario 2 remains subject to the influence of his own prior hatred H. It is therefore arguable that Scenario 2 proves too much. For if VoA theory is right in assuming that society must treat people as autonomous creatures and that society violates that obligation when it allows the use of evidence of matters that cause people to act the way they do, the situation depicted in Scenario 2 suggests that much evidence of human conduct that is now admissible—matters such as prior emotions, desires, attitudes, wishes, and even physical circumstances—would have to be made inadmissible when such matters are offered to show their influence on human behavior. In sum, Scenario 2 suggests that much evidence of human character that is presently admissible to show human conduct would have to be made inadmissible in order to protect the ideal of human autonomy in American law and in society.

The tendency of Scenario 2 to prove too much, however, does not necessarily prove that Scenario 2 is a defective basis for an attack on VoA theory. A critique that “proves too much” is not necessarily flawed. Such a critique can expose a flaw or weakness in the position being critiqued. In particular, the awkward consequences or implications suggested by Scenario 2 may amount to a *reductio ad absurdum* of VoA theory: the conclusions suggested by Scenario 2 about the amount and type of evidence that would have to be made inadmissible if VoA theory were taken seriously and applied consistently may demonstrate that VoA theory is absurd.

An appeal to “unacceptable” consequences can make an argument or theory “absurd” in different ways. Do the implications of VoA theory for the admissibility or inadmissibility of evidence of human conduct show that a VoA rationale for the character evidence rule must be rejected because the consequences of a VoA rationale—the loss of a great deal of probative evidence of human conduct—are just too great? Or do those implications of VoA theory for the

37. Scenario 3 (Figure 3, *supra* at 22) arguably presents a greater affront to the ideal of autonomy than does Scenario 1 (Figure 1, *supra* at 20) because Scenario 3 not only assumes that character is the immediate cause of an actor’s behavior, but also that the actor’s character itself is the effect of a prior cause.

process of proof in litigation demonstrate that there is a *logical* defect in VoA theory—that VoA theory is, in some sense, *incoherent*, *self-contradictory*, or, literally, *nonsense*?

The awkward implications of VoA theory for the admissibility of evidence of human conduct do not demonstrate that VoA theory is literally incoherent. But they do raise a serious question about the validity of the assumptions that VoA theory makes about the nature of autonomy. In particular, the awkward conclusion that evidence of matters such as hatred ought to be inadmissible suggests that there is a defect in the idea that human autonomy requires (absolute) freedom from causality. I will address this point next, in my discussion of rejoinder number 3. Before I do that, however, I want to reiterate and emphasize the central moral of this discussion of Rejoinder 2 and Scenario 2:

If the ideal of autonomy—in the sense of freedom from causal influence—is one's dominant concern, it is very difficult to make a principled distinction between evidence of character, on the one hand, and evidence of many other matters—such as emotions—that can influence human conduct, on the other hand.

The importance of this moral reaches beyond the question of the validity of VoA theory because it may prove to be difficult to distinguish between character and matters such as emotions and desires even if one has an entirely different explanation (one not based on autonomy) for the character evidence rule. I will have more to say about this point in Part III of this paper.

REJOINDER NO. 3: CHOICE AND CAUSALITY: CAUSALITY IS NOT INCOMPATIBLE WITH AUTONOMY

The most forceful rejoinder to the treat-people-as-autonomous theory—the VoA rationale for the character evidence rule—is that even if it is granted that matters such as “character” cause, or influence, “behavior,” it does not necessarily follow that any particular instance of human behavior is not self-determined.

In the analysis thus far I have been tacitly assuming that “character” is an inherited bundle of traits or, in any event, a set of *unchosen* traits, characteristics, and dispositions. If, however, “character” is voluntarily assumed or chosen by the actor, then the cause of “behavior” is a chosen state of affairs, not an inherited one and it may be appropriate to say that the act “caused” by the actor's character is an act that was chosen by the actor.

If “character,” like “behavior,” may be a *consequence* of an actor's free decision, you can have Scenario 5, which is structurally similar to Scenario 2:

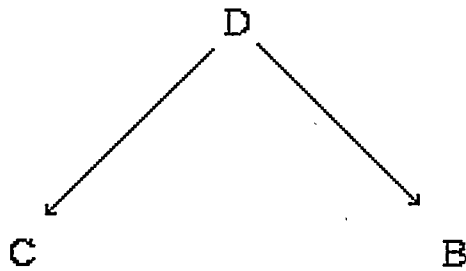


FIGURE 5

Where D = (free) decision

In the situation depicted in Figure 5 a human choice or decision produces or creates a certain behavior, but it also literally creates “character.” In this instance, the actor’s character still serves as evidence of the actor’s behavior, but only because it serves as evidence of a prior decision by the actor. Q.E.D.: the use of character to predict or infer behavior does not necessarily entail the conclusion that inherited or unchosen character alone determines, or predetermines, behavior.

There are two questions that one might ask about this attack on the foundations of VoA theory. First, is the attack sound? Second, does the attack suggest the existence of any features of human character that are important for our purpose—the purpose, that is, of rethinking the character evidence rule?

The answer to the first question is, I think, uncertain. For example, the mere fact that an action can be “caused” by a human choice or decision is not a *decisive* demonstration that human beings have the ability to act autonomously in a world that is subject to causality. There is the complication, for example, that an actor’s choice may itself be the effect of some antecedent event. Perhaps, for example, someone issued a threat T to the actor, saying kill Victim or I will shoot you. Consequently, we have the following situation:

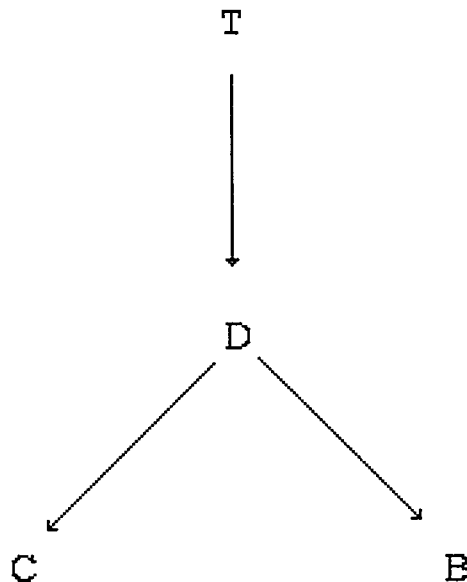


FIGURE 6

Despite the existence of antecedent causes—the existence, that is, of antecedent matters or events that influence human decisions and choices—it is still possible that human beings have the capacity to act “autonomously.” This refined autonomy differs from the previous, absolute concept of autonomy, but the precise difference may be expressed in different ways. One might argue, for example, as G.W.F. Hegel did, that free choice is not synonymous with unconstrained choice and that the concept of autonomy, or freedom, is—to use modern academic jargon—*incoherent* in the absence of constraints or limitations. Hegel put it in the following way on one occasion:

My willing is not pure willing but the willing of something. A will which . . . wills only the abstract universal, wills nothing and is therefore no will at all. The particular volition is a restriction, since the will, in order to be a will, must restrict itself in some way or other. The fact that the will wills *something* is restriction, negation.³⁸

38. G.W.F. HEGEL, PHILOSOPHY OF RIGHT ¶6A, at 228 (T.M. Knob trans., 1967).

Alternatively, one might argue, as Glenn Shafer has—but in a very different context and for a very different purpose—that many of us are prone to misunderstand the concept of “causality.” Shafer suggests that we think of our pictures of temporal links and influences as experiments that both humans and nature conduct with the world.³⁹ We make a basic mistake, he suggests, when we transform our pictures of the world into the world itself. Thus, if we have the experience of being free and making free choices, Shafer’s argument implies (although little in his argument suggests that he himself has considered the precise question that I am wrestling with here), there is little or nothing in the bare notion of causality that forces us to think that we lack the ability to make our own choices.

Such issues about the “true” meaning of causality are both very interesting and very difficult. But I will not pursue them further here because I am, frankly, more interested in the second general question that I posed above. I have been playing a little bit of a trick on you. I am not greatly interested in the question of whether the ideal of autonomy can explain or justify a prohibition against the use of character to show conduct. Thinkers such as Kant, of course, took the “problem” of human autonomy very seriously. But I do not believe that legal scholars today—except perhaps scholars of substantive criminal law—worry nearly as much as Kant and some of his contemporaries did about the possibility that human beings are always mere automatons.⁴⁰ Autonomy-based arguments are therefore important not primarily because of what they say about the possibility of human autonomy, but mainly because of what such arguments and what attacks on such arguments reveal about human character.

The second general question I posed is whether Rejoinder No. 3 suggests something about human beings that is of importance for the

39. See GLENN SHAFER, *THE ART OF CAUSAL CONJECTURE* 2 (1996) (“Nature is an idealization that cannot be avoided in an account of causality, but it is dangerously misleading to think of nature as pure object. By thinking of nature as an observer, we keep within our sight the role of actual observers in defining nature as a limiting idealization, and we thereby keep in touch with the subjective aspects of nature and causality.”).

40. I think this is partly because our understanding of our cosmos is very different from Kant’s; most of us no longer think of the cosmos as a natural order that is rigidly governed by inexorable “causal” laws. I suspect that it is also partly because our moral sensibility is also different from Kant’s. Today most of us are not tortured—as Kant was—by the possibility that we are morally worthless because we are unable to take any action *solely* for the sake of principle. Few present-day real-world judges, law-makers, or legal scholars are likely to let their deliberations about the character evidence rule be influenced by the notion that the rule should express the law’s fidelity to the abstract ideal of human autonomy.

project of rethinking the character evidence rule. The answer is "yes." The thesis of Rejoinder No. 3 is that character, rather than being the *cause* of behavior, may be the result or *effect* of an actor's decisions. The mere statement of this thesis—whether the thesis be true or false—suggests that human behavior may be the result (at least in part) of an internal decision making system, some sort of operating system that is internal to human beings.

Rejoinder No. 3 questions the proposition that the hypothesized existence of a causal connection between character and conduct logically implies that people are unfree: Rejoinder No. 3 asserts that the mere fact of the inferential significance of character for conduct does not mandate the conclusion that human beings live in a prison-house of traits and attributes that they have merely inherited or otherwise acquired, willy-nilly, through no choice of their own. Whether or not this argument succeeds in disproving the thesis that a causal connection between character and conduct implies the unfreedom of human actors, Rejoinder No. 3 does suggest or, at least, *evoke* a very important proposition. The argument of Rejoinder No. 3 (unlike the argument of Rejoinder No. 2) shows that it is logically permissible to suppose that matters such as "choice" and "decision" can "cause" or influence behavior. This is a logical possibility because, as Figure 5 shows, it is logically permissible to believe that a phenomenon such as "character" serves as evidence of conduct because—or, even, *only* because—"character" serves as a sign or indicium of human "choice" or "decision." In other words, (i) it is logically permissible to suppose that "character" is "caused" by matters or events such as "choice" and "decision," and, (ii) that being so, it is logically possible to take "character" as evidence of some "choice" or "decision."

The observation that decisions can cause or influence actions is interesting for my purposes, not so much because of what it says about the possibility of human autonomy, but principally because of what it suggests about the likely "causes" or sources of human behavior and conduct. The underlying intuition of VoA theory is that "character" is an alien thing that can drive people to do things that they do not necessarily choose to do. The underlying intuition of the *attack* on VoA theory pictured in Figure No. 5 is that a person's "character" is not, somehow, alien to the person who has such-and-such a character, but that a person's character is in some sense his own. This way of thinking and talking, to be sure, does not explain in any clear way why character is or is not incompatible with human autonomy. But this way of thinking about character—that is, thinking about character as *belonging* to a person and being *part* of a person—does suggest that the right way to begin to understand

human character (either in general or the character of particular people) is by keeping in mind that a person's character is closely connected to that person's *makeup*.

The scenario depicted in Figure No. 5 suggests yet another important lesson about the character of character. Viewed from the perspective of that scenario—the perspective, that is, of the supposition that human decisions can cause (or influence) both actions and character—there is no *necessary* inconsistency between “character” and “autonomy.” The consistency of behavior over time that the word “character” usually signifies can be viewed as the product of a pattern of *choices*, as a reflection of *consistency of decisions*. This is an important possibility because it suggests that *character (like choice) may be the result of the logic (including thinking and feeling) that drives or moves or inclines people to make the decisions and choices that they make.*

Let me describe the implications of Rejoinder No. 3 in a slightly different way. Rejoinder No. 3 serves as a reminder (though not as a demonstration) of an important general proposition about human beings and human behavior:

Human beings have an internal operating system that directs, regulates, or influences their behavior; they have within them a set or collection of rules, principles, and operations that affect how they behave.

One of my principal claims is that *character evidence is inferentially interesting because evidence about character may generate knowledge about the “internal logic” or internal “operating system” of a human actor.* Hence, for my purposes, the most important upshot of my analysis of the VoA theory is not so much the proposition that the internal logic that drives or directs human actors is a self-chosen logic as it is the (common sense)⁴¹ proposition that there *is* some sort of internal logic or mechanism that influences human behavior.

C. The Character Evidence Rule: An Appropriate Expression of the (Alleged) Fact of Human Autonomy?

If one is befuddled by the twists and turns that I have just described in the debates and discussions about the VoA rationale,

41. Even a friendly observer might wonder if I am justified in expending as much intellectual capital as I do on my effort to bolster a proposition that many observers might regard as a truism. I think the answer to that penetrating question is probably “yes” because (if for no other reason!) much evidence scholarship on the character evidence rule seems to *ignore* this “truism.” A major part of the *point* of my argument is that much discourse and literature about the law of evidence seem to ignore propositions about character that are regarded as truisms both by people in other disciplines and by “ordinary” people.

one might try to cut through that tangle of arguments and counter-arguments by making the simple and straightforward assertion that the character evidence rule is warranted or required because people *in fact* start out afresh each day—because people are *in fact* entirely different, or discontinuous, entities from day to day. This gambit attempts to replace the VoA rationale—the “value of autonomy” rationale—with a FoA rationale—with a “fact of autonomy” rationale.

As bold as it is, the FoA gambit for avoiding the twists and turns of arguments about the VoA rationale does not wash. It cannot be said that, because human beings are “spontaneous” or “autonomous,” the behavior of a human actor on one occasion is never relevant to that same actor’s behavior on another occasion. There is something wrong with any notion of human autonomy or spontaneity that suggests such a patently ludicrous conclusion. Despite the existence of a substantial body of philosophical literature that seems to question the proposition that there exist individual human entities that persist over time, it is simply indubitable that there is a significant degree of continuity in the behavior of most human actors over time. The real question is, instead, what, if anything, the law—and, in particular, the law of evidence—should make of such continuity in the characteristics and behavior of human beings.

III. The Prohibition Against Circumstantial Character Evidence: Appearance and Reality

The practice of using information about the human psyche as evidence in criminal trials has a long pedigree in America. Long before legal scholars of evidence generally acknowledged the practice, trial lawyers were in the habit of using closing arguments to tell stories about the motivations, beliefs, superstitions, delusions, phobias, fears, hopes, ambitions, political beliefs, aspirations, religious convictions, pretensions, vanity, self-loathing, resentments, hatreds, affections, infatuations, moods, depressions, grief, sorrows, bereavement, and other attitudes, thoughts, and feelings of the people whose conduct may have played a part in shaping the events and actions in issue at trial. In short, American trial lawyers have been exploring and discussing human character in their closing arguments for many years.⁴²

42. See JIM M. PERDUE, WHO WILL SPEAK FOR THE VICTIM?: A PRACTICAL TREATISE ON PLAINTIFF’S JURY ARGUMENT 393-394 (edited version of actual arguments in “The Case of the Errant Surgeon”; describing plaintiff as “passive” and “shy.” in part to explain why plaintiff, after developing post-surgical complications, failed to act more

Whatever the character evidence rule may mean today, it does not mean that it is impermissible to use evidence to paint a picture of a person's psyche, his beliefs, his thinking, his aspirations, and the like in order to show that the person did or did not act in a particular way on a particular occasion. There is no meaningful sense (except in a "technical" and arid legal sense) in which it can be said that the law prohibits the use of evidence of a person's "character" to show conduct. A person's way of thinking, his aspirations, and similar matters are part of a person's "character." Vast amounts of evidence about human character are routinely admitted under existing law—without the benefit of any "exception" to the character evidence rule. It is true that the existing character evidence rule is not wholly a paper tiger: the rule does bar the admission of some character evidence. But inadmissible character evidence is a small island in a vast sea of admissible character evidence.

Dissection of the human psyche in the courtroom is not confined to the closing argument. It also takes place during the process of proof—in particular, in and through the submission of evidence that "technically speaking" does not contravene the character evidence rule. For example, without resorting to any exceptions to the character evidence rule, courts have allowed parties to try to show the doing or non-doing of a specific act by showing a person's

- evidence of an intent to deceive⁴³
- greed⁴⁴
- jealousy and greed⁴⁵

aggressively and promptly to have them corrected); *United States v. Fernandez*, 94 F.3d 640, 1996 U.S. App. LEXIS 22634, *40 (1st Cir. 1996) (unpublished opinion) (argument that defendant committed drug transaction because of greed); *United States v. Leigh*, 104 F.3d 356, 1996 U.S. App. LEXIS 33499, *1-2 (2d Cir., 1996) (unpublished opinion) (argument that defendant committed fraud because of greed); see also Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 642 (1972) ("It has been held reversible error to call the defendant 'doubly vicious because he demanded his full constitutional rights,' a 'cheap, scaly, slimy crook,' a 'leech of society,' a user of 'Al Capone tactics of intimidation,' and a 'junkie, rat and "sculptor" with a knife.' Courts have, however, found no error in cases in which the defendant was called 'animalistic,' 'lowdown, degenerate and filthy,' 'a mad dog,' 'a rattlesnake,' 'a trafficker in human misery,' 'a black-hearted traitor,' 'a hired gunfighter,' 'a creature of the jungle,' 'a type of worm,' or 'a brute, a beast, an animal, a mad dog who does not deserve to live.'").

For a highly informative and deliciously entertaining discussion of insults and other comments about character during closing argument see ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK § 10.25 (1991). See also Samuel R. Gross, "Make-Believe: The Rules Excluding Evidence of Character and Liability Insurance," 49 HASTINGS L.J. 843 (1998) (examples of references to character in closing arguments).

43. See *United States v. Zimeri-Safie*, 585 F.2d 1318, 1321-22 (5th Cir. 1978)

44. See *United States v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1995), cert. denied, 516 U.S. 843 (1995).

- obsession with sex⁴⁶
- interest in explosives⁴⁷
- desire to take revenge on a "snitch" (as well as evidence suggesting that the defendant "was not just blowing off steam," and evidence for the purpose of "[filling] in the picture of [the defendant] as a man who was not well disposed to those who snitched on him, who threatened others verbally and physically, and who carried out his threats"),⁴⁸
- antipathy toward Roman Catholic priests⁴⁹
- motivations and beliefs of gang members, including their loyalty to a gang and its hierarchy and their willingness to use violence to defend their gang.⁵⁰

45. See *Nelson v. State*, 513 S.W.2d 496, 498 (Ark. 1974) (discussing motives to commit first degree murder).

46. See *Boyle v. Johnson*, 93 F.3d 180 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 968 (1997). Boyle was indicted for capital murder during the course of committing or attempting to commit aggravated sexual assault, and capital murder during the course of kidnapping. Boyle argued that the trial court erred in admitting evidence of his sexual habits and drawings. See *id.* at 183. The court of appeals held that the evidence was properly admitted. See *id.* at 185. The court said, "Evidence of Boyle's sexual obsession was . . . relevant to the issue of Boyle's future dangerousness; it tended to show that Boyle 'would constitute a continuing threat to society.' TEX. CODE CRIM. PROC. art. 37.071(b)(2) (Vernon 1981)." *Id.*

47. See *People v. Daniels*, 93 Cal. Rptr. 628, 633 (Cal. Ct. App. 1971) (defendant charged with attempted murder by exploding a bomb in car).

48. *State v. Berry*, 484 N.W.2d 14, 17 (Minn. 1992)

49. See *State v. Abercrombie*, 375 So. 2d 1170, 1176 (La. 1979)

50. See *United States v. Thomas*, 86 F.3d 647 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 392 (1996). The defendant was convicted of (1) conspiracy to distribute cocaine base; (2) use or carrying of firearms during the commission of a drug trafficking crime; (3) continuing criminal enterprise ("CCE"); and (4) distribution of cocaine base. See *id.* at 648. The defendants were members of a gang.

"Story [one of the defendants] was a member of a street gang, specifically the Mafia Insanes of the Almighty Vice Lord Nation. Thomas, Garnett, and Bradford became involved with the gang by taking an oath of loyalty. Story later provided Thomas and Garnett with a written copy of the oath and principles of the gang, and Story and Thomas occasionally reminded Garnett to follow the principles. The oath of the Almighty Vice Lord Nation, which the government introduced into evidence, provides, in part, that 'nor in the threat of death will I deny those brothers who stand beside me.' The principles of the Mafia Insanes, which were also admitted into evidence, include a direction to 'obey all commands without question fear or doubt.' Trial testimony further revealed that Vice Lords were not supposed to testify against fellow Vice Lords. Many of the street dealers who worked under the defendants recognized that the defendants, along with Garnett and Bradford, were affiliated with the Mafia Insane Vice Lords. The district court admitted the preceding evidence despite defendants' motion in limine to exclude all evidence of their gang affiliation."

Id. at 649. The court of appeals held that the admission of all of this evidence (including the oath) was not error. *Id.* at 652-53.

In one sensational case, prosecutors argued against severance of fraud and murder charges for trial in the following way:

Desperate and deeply in debt, Craig Rabinowitz had a choice: Confess his deceitful double life to friends and family—or kill his wife to collect on a \$2 million life insurance policy.

Telling all would mean disgrace and a life of shambles. Killing Stefanie Rabinowitz meant no more debt and the chance to fulfill a fantasy—with Summer, the topless dancer of his dreams.

When it came time to be a man, prosecutors say, Craig Rabinowitz became a murderer.

“Rabinowitz chose murder and deceit over coming clean to those around him,” writes Montgomery County Prosecutor Bruce L. Castor Jr. in a brief filed Monday in Norristown, Pa.

“He simply could not bear the thought of being found out.” . . .

Castor argues that Rabinowitz’s fraud case helps establish the motive, premeditation and malice of the murder.⁵¹

In a number of cases, courts have sanctioned the use of evidence to show a person’s mental or psychic world even though the evidence harbors information about the defendants’ racial, political, or religious beliefs.⁵² Examples of such admissible evidence about

51. *Prosecutors Say Man Killed Wife for Insurance Money*, THE WASHINGTON POST, August 27, 1997, at A15.

52. See *infra* note 58. There are occasional manifestations of judicial unease with the use of matters such as religious or political beliefs to show the doing or non-doing of an act. Such uneasiness about the use of matters such as religious belief to show conduct surfaced in a classic case that is now generally viewed as being principally about the habit evidence rule. In *Levin v. United States*, 338 F.2d 265 (D.C. Cir. 1964), the court of appeals, using the language for which the case is remembered, said that religious practice does not achieve the status of an admissible habit both because religiously-motivated practices are voluntary rather than semi-automatic and because religiously-inspired behavior does not achieve the degree of “invariable regularity” that is required to make repetitive behavior a habit. *Id.* There is reason to think, however, that what troubled the court of appeals was simply the defendant’s attempt to inject his religious beliefs into the case. The trial court in fact admitted evidence of Levin’s habitual religious practices (specifically, his tendency to observe the Jewish Sabbath and his religious motivations for doing so). The trial court and the court of appeals seemed to draw the line only when Levin offered to have a Rabbi testify to the religious reasons for Levin’s observance of the Sabbath.

The Federal Rules of Evidence prohibit the use of religious belief or its absence to attack or repair the credibility of a witness. Fed. Rule Evid. 610. But there is no parallel prohibition in the Federal Rules of Evidence against the use of religious belief or its absence to show conduct.

There is now a body of constitutional jurisprudence that purports to place some limits (principally in the name of the First Amendment) on the use of matters such as political belief as evidence of conduct. The leading case is *Dawson v. Delaware*, 503 U.S. 159 (1992). In *Dawson*—a capital sentencing proceeding—evidence was offered that the words “Aryan Brotherhood” were tattooed on the defendant’s hand. The Aryan Brotherhood refers to a white racist prison gang. *Id.* at 162. But both the defendant and

people's mental and emotional worlds—offered to show human behavior—could be easily multiplied.

The principal doctrinal “handle” for the admissibility of evidence of people's psyches—their mental and emotional states or “worlds”—is the principle that the use of “motive” to show conduct does not contravene the character evidence rule because—according to the standard learning—motive is not character.⁵³ Sometimes evidence about the human psyche is admitted under the analogous principle that the use of matters such as “design” and “plan” and “intent” to show conduct does not contravene the character evidence rule—because matters such as “design” and intent are not “character.”⁵⁴ But, whether or not matters such as “greed,” “jealousy,” and “hatred” *technically*—legally speaking—amount to “character” or “disposition,” evidence of such matters *does* create—and is *intended* to create—a picture of the mental and emotional world, or makeup, of a person.

Recognition of the widespread admissibility of character evidence under existing law may not make the riddle of the character evidence rule more tractable. But an awareness of the widespread admissibility of character evidence does change the *thrust* of the riddle. The issue is *not* whether character evidence should be made

the victim were white. *Id.* at 166. The Court held that the evidence violated the defendant's First Amendment rights of free speech and association because it proved no more than the defendant's “abstract beliefs.” *Id.* at 166-68.

But it now appears that federal constitutional law imposes only very weak constraints on the courtroom use of matters such as political and religious beliefs. For example, a post-*Dawson* Supreme Court decision seems to require only a showing of the relevance of a defendant's racist beliefs for their use as evidence against a criminal defendant. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993). In *Mitchell*, the Court said, “The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a person's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.” *Id.* at 489. Lower courts have made this point even more explicit. *See Boyle v. Johnson*, 93 F.3d 180, 184 (5th Cir. 1996) (“*Dawson* simply requires that the evidence be relevant to an issue at sentencing.”). In any event, in many cases the motivations and beliefs that are introduced as evidence of conduct can scarcely be described as “political,” and vast amounts of evidence about the human psyche are apparently routinely offered and admitted without any suggestion by any party that such evidence implicates constitutional doctrines that protect matters such as rights of association, speech, assembly, and the exercise of religion.

53. *See United States v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1995) (holding that because evidence was introduced to show motive of greed, it did not violate the character evidence rule); *People v. Daniels*, 93 Cal. Rptr. 628, 633 (Cal. Ct. App. 1971) (“It is elementary, evidence of motive to commit an offense is evidence of the identity of the offender.”).

54. *See United States v. McCarthy*, 97 F.3d 1562, 1572-73 (8th Cir. 1996) (admitting evidence of prior drug transactions, occurring over a period of years, to show intent and knowledge).

admissible. Much character evidence is already admissible. The issue, in general, is whether the current "straddle" between admissible and inadmissible character evidence is the right one. This requires an examination of whether the law has correctly defined character.

IV. Character as a Bundle of Traits *versus* Character as the Animating Spirit or Operating System of the Human Organism

Law is—at least in part—a practical discipline and also—at least in part—an expression of (relatively) contemporary cultural and social beliefs and prejudices. It is therefore not surprising that the law often falls prey to popular but shallow conceptions of man/woman and his/her relationship to the cosmos. The conception of character that law makers, courts, and legal commentators have seemingly embraced in their discussions of the character evidence rule is a good example of the influence of intellectual fads and fashions on the law.

American legal discourse about the character evidence rule—judicial opinions, commentaries of legal scholars, and debates and discussions of lawmakers and codifiers—uniformly tends to portray "character" as little more than a fortuitous aggregation—a slapdash collage—of traits and dispositions. For example, speaking of the difference between character and methods of proving character, Wigmore—the dean of all evidence scholars, said, "character . . . is to be considered . . . as the actual moral or physical disposition or sum of traits."⁵⁵ In the same vein, Wigmore equated "character or disposition" with "a fixed trait or the sum of traits."⁵⁶ Many other courts and legal scholars have spoken in a similar fashion about "character."⁵⁷

55. 1A WIGMORE, *supra* note 5, § 52, at 1148.

56. *Id.*, §55, at 1159.

57. See Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 849 (1982) ("In the simplified lexicon of evidence law, 'character' may be understood to be a collection of 'traits,' each a self-contained packet of potential conduct consistent with previously observed reactions to events, people, or things.") Despite the tone of detached skepticism in this comment, Professor Uviller does not offer an alternative notion or definition of character. Cf. Richard Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981). Although Kuhns effectively characterizes current formulations of the character rule as incoherent, Kuhns himself implicitly thinks—or, at least, talks—about character in terms of "propensities".

The potpourri conception of human character usually does not appear explicitly in judicial opinions—partly because judges are less verbose than law teachers—but it does appear implicitly. See *Commonwealth v. John Nagle*, 32 N.E. 861, 861 (Mass. 1893) ("Ordinarily the defendant in a criminal case may put in evidence his general good

Wigmore clearly deserves our respect. He was a man of monumental intellectual and scholarly accomplishments. But his way of talking about human character reflects a shallow and inadequate conception of human character.

The notion that character is an accidental aggregation of attributes and propensities is nonsense. Human character is not merely a fortuitous collection of attributes and traits.

What are the historical origins of the notion that character consists of an adventitious aggregation or fortuitous bundle of "traits"? How did such a transparently shallow conception of human character manage to achieve a dominant position in American legal discourse about the character evidence rule? Although other scholars have discussed the origins and the history of character evidence rule,⁵⁸ I cannot offer an authoritative answer to these questions.

reputation in regard to the elements of character involved in the commission of the crime charged against him, for the purpose of establishing the improbability of his having done the wrong imputed to him. A man of good character is unlikely to be guilty of a crime involving moral turpitude, and reputation is the index of character. This rule has little or no application to penal acts which have no moral quality, but are merely *mala prohibita*. That one is of good reputation as an honest, peaceable citizen has little tendency to show that he has not violated a statute or ordinance forbidding him to catch trout out of season, or to drive certain vehicles faster than a walk, or requiring him to keep the sidewalks abutting on his premises free from snow and ice.").

The conception of character as a collection of traits and dispositions has been popular in psychology as well as law. See Mendez, *supra* note 17, at 1051; Miguel A. Mendez, *The Law of Evidence and the Search for a Stable Personality*, 1996 EMORY L.J. 221, 226-227. See also Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504 (1991); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 26-29 (1987) (hereinafter Leonard, *Rationality and Catharsis*); David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 315-16 (1995) (hereinafter Leonard, *Political Process*). It is both interesting and reassuring to note that traditional "trait theory" in psychology—the analogue in psychology to the conception of character that I criticize here—has gone out of fashion in psychology, largely because empirical studies apparently failed to confirm the hypothesis that discrete traits predict behavior. See Mendez, *supra*, at 227-28. Moreover, some newer personality theories—theories that move away from traditional "trait theory"—are apparently not dissimilar to the kind of conception of character for which I argue in this paper. See generally *id.* at 226-36 (describing the personality theory of Walter Mischel and Yuichi Shoda and discussing the implications of the theory for the character evidence rule).

58. David Leonard seems to trace the origin of the notion of character as a collection of traits to psychological literature in the early part of the twentieth century, particularly to Gordon Allport's influential work. See Leonard, *Rationality and Catharsis*, *supra* note 57, at 26. But I think it is fair to say that notions analogous to the notion of "traits" were "in the air" before Allport came on the scene. See *supra* note 57. For example, viewed from the vantage of 20th century "trait theory," Book II of David Hume's A TREATISE OF HUMAN NATURE consists principally of discussions of various character traits and dispositions (ranging from "pride and humility," "love of fame," "love and hatred," "love

of relations," to "passions" such as "esteem for the rich and powerful" and "malice and envy"). See John O. McGinnis, *Law, Human Behavior and Evolution*, 8 J. CONTEMP. LEGAL ISSUES 211, 211 n.1 (1997) ("David Hume outlined the way that various human propensities—'passions' in his words—were responsible for social behavior and social structure."). Even in the legal arena discussions of conceptions of character in terms of "traits" and "dispositions" appeared long before Allport's theory appeared. Allport was born in 1897. The first edition of Wigmore's treatise, which was published in 1904, talks about "traits" and "dispositions." See, e.g., John Henry Wigmore, 1 A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 52, at 119-121 (1904) (the heading of this section is "'Character' in Two Senses: Disposition, and Reputation of it"); *id.* § 55, at 122 (Wigmore uses the phrase "character or disposition—i.e. a fixed trait or the sum of traits"). There was talk about "traits of character" before the Supreme Court of the United States as early as the 1860s. In *Thompson v. Bowie*, 71 U.S. (4 Wall.) 463 (1867), the attorneys for one of the parties argued,

It has been often decided by the courts in civil as well as criminal cases, that wherever a particular trait of character is involved, or is illustrative of the matter disputed, there the character of the party in that particular trait may be given in evidence. Thus, honesty in cases of felony, peaceable disposition, or quarrelsomeness when drunk, in those of riot, &c., chastity in those of seduction and criminal conversation, &c., &c. By the admission of such testimony, the courts recognize the principle contended for, that a man known to act usually in a certain manner, under certain circumstances, will be presumed to act in the same manner when shown to be subjected to the same circumstances.

Id. at 467 (footnotes omitted).

There are other references in cases before 1900 to the use of "traits of character" as evidence. See, e.g., *United States v. Kenney*, 90 F. 257, 263 (Del. Cir. Ct. 1898) (charge to jury: "It does not necessarily follow from the fact that a man has a good reputation for honesty and integrity that he actually possesses those traits of character. The mere possession of such a reputation does not render the person possessing it incapable of committing a crime involving dishonesty and a want of integrity."); *Mercer v. State*, 40 Fla. 216, 233-234, 24 So. 154, 159 (1898) ("The general well settled rule of law is, that when the character of a witness is gone into the only proper object of inquiry is as to his reputation for truth and veracity. Neither his general character, nor particular phases or traits of character can be gone into, but the inquiry must be confined to his reputation or character for truth and veracity."); *Tedens v. Schumers*, 112 Ill. 263, 267 (1884) (while rejecting use of specific instances of honest dealing to bolster veracity of witness, court uses phrase "traits of character"); *Commonwealth v. Nagle*, 157 Mass. 554, 554-555, 32 N.E. 861 (1893).

Professor Leonard notes that more recent psychological research and theorizing on personality has shifted away from Allport's "trait theory." See Leonard, *Rationality and Catharsis*, *supra* note 57; see also Mendez, *supra* note 57. But see Davies, *supra* note 57 at 515-17 (arguing that trait theory is not quite as passé as Leonard, Mischel, and Mendez suggest). This shift in personality theory seems compatible with the kind of conception of human character that I am trying to describe here. The two types of theories—the new type of personality theory and my theory of human character, while similar in certain respects, are not the same, and I do not claim that the new type of personality theory that Professors Davies, Leonard, and Mendez describe offers any direct support for my account of human character. Needless to say, however, I would be encouraged if scholars who are better versed in personality theory than I am were to conclude that a sound personality theory offers some support for the thesis I am advancing in this paper. By the same token, I am unwilling to assume that the validity of my theory depends on the validity of the new style of personality theorizing that Leonard and Mendez describe; I

Nonetheless, I think I am justified in saying that the notion of character as a bundle of traits has the feel and the smell of nineteenth century British empiricism.⁵⁹ The notion that human character consists of a bundle of traits and dispositions reeks, in particular, of Dave Hume's philosophy.

From a Humean⁶⁰ perspective on (wo)man and the cosmos—that is, from a standpoint that is nominalist as well as empiricist—human knowledge consists of perceptions⁶¹ or—if one is not too starkly

have independent reasons for believing what I believe about human character. See further discussion in note 57, *supra*.

Professor Leonard and I draw rather different conclusions from the (supposed) demise of "trait theory." He seems to suggest that the empirical studies leading to the (supposed) demise of trait theory show that character evidence lacks significant probative value. See Leonard, *Rationality and Catharsis*, *supra* note 57, at 26-29. I would suggest that if trait theory is indeed dead, its demise does not necessarily show that character is worthless as evidence. The empirical studies that cast doubt on trait theory may instead only show that a particular theory of human character—trait theory—is invalid. Susan Marlene Davies carefully makes this distinction in her interesting and important paper on character evidence. See Davies, *supra*, at 528-31. Professor Mendez is on exactly the right track when he implicitly suggests that the possible demise of trait theory and the emergence of a different and possibly better theory of personality require a reconsideration of the prohibition against character evidence. See generally Mendez, *supra* note 57, (discussing Mischel-Shoda theory) Mendez concludes, however, that even if the alternative Mischel-Shoda theory is valid, character evidence should probably remain inadmissible. See *id.* at 234. It is true that Professor Mendez does occasionally seem to assume that character = disposition = Allportian traits. See, e.g., *id.* at 228 ("these findings [casting doubt on Allport's trait theory] not only undermine 'common sense' or intuitive notions of the predictive value of personality traits, but also threaten the law's assumption about the probative value of character evidence.") In general, however, Professor Mendez recognizes that it is one thing to say that a particular theory of personality (human character) is a worthless theory and that it is another thing to say that personality (human character) is worthless evidence.

59. I am neither asserting nor suggesting that any philosophical movement or school—be it nineteenth century British empiricism or any other such philosophy or intellectual movement—is largely or even partially responsible for the prevalence of the soufflé-of-traits conception of human character in American legal discussions of the character evidence rule. Only a careful and exhaustive analysis of the historical record would make it justifiable to advance such a claim. Nonetheless, the existence of such a connection is not intrinsically implausible. It is a fact—a suggestive fact—that some prominent English and American empiricist philosophers and theorists spoke of "character" in much the way that leading evidence scholars such as Professor Charles McCormick and Dean Wigmore did when they talked about character evidence. There is ample evidence that many leading Evidence scholars such as Wigmore were influenced by British empiricism—and by Jeremy Bentham in particular. See generally William Twining, *The Rationalist Tradition of Evidence Scholarship*, in *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 32 (1990).

60. In my discussion here I do not purport to remain faithful to the details of Hume's philosophy. I try instead to speak in a general vein about the implications of Hume's general philosophical position.

61. See DAVID HUME, *A TREATISE OF HUMAN NATURE* Book 3 Part 1 (1738. Past

nominalist—it consists of human experiences of sensory events. The acquisition of knowledge, therefore, involves discerning continuities and patterns in perceptions or in human experience of sensory events. A nominalist believes we know only what lies at the surface of our experience, not what lies underneath them, behind them, or outside of them. Patterns in perceptions and sensory events are therefore, as far as we know, “accidental” or “fortuitous.” We cannot say, for example, that because events of type A characteristically or typically seem to precede events of type B, that instances of A *cause* instances of B. We can only say that we have had perceptions or sensory experiences of instances of B following our perceptions or sensory experiences of instances of A. This is, roughly speaking, the Humean view of the cosmos and of man’s knowledge of the cosmos.⁶²

From a Humean point of view, the limitations on human knowledge of the cosmos also apply to human knowledge of the self. (Human selves are part of the cosmos.) Hence, in observing our selves (including the selves of other persons) all that we can say (if we can say anything at all) about human selves is that in our selves (so to speak) we have observed certain patterns or sequences of sensory events (or, more precisely stated, certain sequences of perceptions, sensory experiences, or sensory states).⁶³ Hence, we are not justified in saying, for example, that “anger” *causes* “hitting” merely because we have seen, in the past, in our selves (or in some particular self) that “hitting” has always or usually followed “anger.” The best that we can say—and, really, *all* that we can say—is that we believe, based on our past observations, that there are certain patterns or tendencies in our selves—in the (states of the) selves that

Masters CD-ROM ed., 1992) (“nothing is ever present to the mind but its perceptions”).

62. Hume thought that perceptions are, so to speak, accidental, or fortuitous, and that human thought is the result of such fortuitous perceptions. Human thought about the connections between or among things is therefore legitimate only when and only if human perceptions have certain patterns. Thus, human thought is, so to speak, inherently statistical. See, e.g., *id.* (“It has been observed already, that in no single instance the ultimate connexion of any objects is discoverable either by our senses or reason, and that we can never penetrate so far into the essence and construction of bodies, as to perceive the principle on which their mutual influence depends. It is their constant union alone with which we are acquainted; and it is from the constant union the necessity arises.”)

63. From a strictly empiricist and nominalist point of view, perceptions—or (subjective) sensory experiences—are *all* we know. We cannot know what lies behind our perceptions. We cannot even know *that* anything stands behind them. Consequently, we can know *ourselves* only as beings who have perceptions—or, more starkly, only as a point in space and time at which a variety of perceptions converge. (Indeed, if we are quite rigorous in adhering to our empiricist and nominalist premises, we may not even be justified in saying that we are in fact beings who have or somehow receive perceptions. For to say that perhaps would be to go behind the perceptions themselves, which cannot be done.)

we have observed.⁶⁴ This nominalist and empiricist way of thinking about the self is very reminiscent of the way that literature in the law of evidence describes human character—as a set of dispositions or traits that people just happen to have.

A Humean account of the self is no more persuasive than is a Humean account of the cosmos. Like the Humean account of the cosmos, the Humean account of the self provides no adequate explanation of our right or ability, on the basis of our past observations and perceptions, to make judgments or predictions about the probable state of some event or condition: in a Humean world we cannot look behind our experiences to make a reasoned or considered judgment about the probability that a past pattern of events or behavior will recur. This cognitive deficiency must apply to human knowledge of the self as well as to human knowledge of the cosmos. In a Humean world it is not possible to make judgments about the probable causes of or reasons for the actions of a self; in a Humean world we can only say that a self has a seeming tendency or disposition to act in a certain way. Though Hume may have believed the contrary—Hume is, after all, regarded by many as the *paterfamilias* of modern statistical theory, a Humean perspective offers no basis for making any judgments about the probable states of unobserved or unknown conditions, whether those unknown conditions are conditions in the cosmos or whether they are conditions of human selves. Consequently, Hume's way of thinking about the world, about (wo)man's knowledge of the world, and about (wo)man himself (herself) is not coherent.⁶⁵

64. Indeed, if we are strict nominalists and empiricists, we may be saying too much if we say that our observations or perceptions lead us to conclude that certain people have certain dispositions or tendencies. All that we are really justified in saying is that we have perceived or observed (in the past) certain patterns of human behavior in certain people—that we have observed or experienced certain patterns in the states of human selves. We may not be entitled to project those past patterns into the future or into unknown and unobserved occasions. This, of course, is nothing more than the problem of “induction” that Hume so notoriously wrestled with. Hume's “solution” of the problem was no solution at all. Cf. 1A WIGMORE, *supra* note 5, § 37.6, at 1050-1054 n.8 (critique of analogous frequentist theories of induction). Moreover, if Hume's solution did not solve the problem of induction about events in the cosmos, his nominalist and empiricist approach, *pro tanto*, also did not correctly solve the question of how one makes sound inferences and judgments about the behavior of human beings. For if sound inference about the cosmos require some theory about the “hidden” structure of the cosmos, the same is true of inferences and judgments about the behavior of human beings: they also require some theory of the structure of human beings, their makeup, and their *character*.

65. A Humean way of thinking about (wo)man and his (her) world—a way of thinking that is nominalist as well as empiricist—has considerable difficulty in explaining the existence of “persons.” Hume's (radical) philosophy seems to imply that “persons” and their “psyches” exist only if, and only to the extent that, there happens to be some conjunction of events or perceptions—a conjunction that Hume calls “association”—at

The incoherence of Hume's philosophical perspective was apparent to some observer's in Hume's own era. Hume's best known nearly contemporary challenger was Immanuel Kant. Kant, with Hume in mind, made the argument long ago that the notion of an entity that we call a "person" is inexplicable unless there is something more to a person than just the sense data and perceptions that, so to speak, flow into or through a person.⁶⁶ I cannot pursue the details of

some particular locus in space and time. This view creates any number of difficulties and puzzles. For example:

- (i) Is the existence a person to be equated with the human body?
- (ii) Does a person cease to exist when a set of events no longer congregates at a particular space-time locus?
- (iii) But if the answer to question (ii) is "yes," how can the answer to question (i) also be "yes"?
- (iv) Does a person cease to exist when he or she goes to sleep?
- (v) Does a person exist after his death—providing and as long as "his" body still exists?

And so on.

On a Humean view, the thoughts and notions and principles that seem to stream through the heads and hearts of human beings are nothing more than and nothing other than the sensations that happen to be associated with each other at a particular point in space and time. This Humean way of thinking about human beings is not satisfactory. His way of thinking cannot explain the existence, the workings, or the *character* of human beings.

It is true that some philosophers still puzzle over the question of what it is that makes it possible and legitimate to say that some set of space-time events or states constitutes a "person"; some philosophers still puzzle over the question of what it is that makes it permissible and legitimate to say that the a person persists as a person (the same person) over time; and some philosophers still wrestle with the question of why it is permissible and legitimate to deny that a "new person" comes into existence with each passing moment of time. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS*, 27-114 (1981). However, most of the philosophers who ruminate about such questions probably do not challenge the presupposition that people do "exist" and "cohere" over time. They seek primarily to *explain* that presupposition, which they generally seem to take as "true."

Hume himself said that "the same person may vary his character and disposition, as well as his impressions and ideas, without losing his identity" and that it is *memory* alone—memory of the "succession of perceptions"—that is "chiefly . . . the source of personal identity." HUME, *supra* note 61, Book I, Part 4. After saying this, Hume seems to suggest that "identity" is nothing more than a pleasant fiction that owes its existence to the desire of the human mind for simplicity: "What I have said concerning the first origin and uncertainty of our notion of identity, as applied to the human mind, may be extended with little or no variation to that of simplicity. An object, whose different coexistent parts are bound together by a close relation, operates upon the imagination after much the same manner as one perfectly simple and indivisible, and requires not a much greater stretch of thought in order to its conception. From this similarity of operation we attribute a simplicity to it, and feign a principle of union as the support of this simplicity, and the centre of all the different parts and qualities of the object." *Id.*

66. Kant's best-known response to Hume's skeptical challenge had to do with the possibility of causality in a world of sense-based phenomena. But Kant's rejoinder to Hume was not directed solely at the problem of the possibility of science and scientific reasoning; his objective was not solely to rehabilitate science and scientific explanations. Kant's counterattack was equally directed at Hume's notion that human beings—and

Kant's argument here. Suffice it to say that Kant saw human beings as constructive, creative, or constitutive entities who *impose* an order on the world that they experience. In Kant's schema human beings in an important sense *consist* of the principles by which and through which they organize and constitute their experiences and perceptions.

This general idea—the idea that the very existence and identity of a “person” implies that human beings are entities who are governed by and who constitute certain ordering principles; the idea that it is the existence of such a set of internal principles governing human beings that makes it possible to say or think that a person exists—this general idea is a very old one. The idea is—at the very least—implicit in Plato's *Republic*. The same general idea is *explicit* in Aristotle's elaboration of his conception of the human animal and its psyche.

Aristotle discussed the nature of the human psyche most fully in *De Anima*.⁶⁷ Although *DE ANIMA* may be best known for Aristotle's insistence that the “soul”⁶⁸—the human psyche—cannot exist apart from the body, the most important part of Aristotle's argument for our purposes is his claim that human beings have “organized” bodies and that human bodies (and other bodies) are “naturally organized.”⁶⁹ A naturally-organized body is a body that has the ability to organize itself.⁷⁰ The thesis that human beings (and other

their thinking—are little more or nothing more than an accidental confluence of sense data or sensory perceptions.

There must be—Kant thought—some thing or matter that makes a “synthetic unity” out of “apperception.” The mere convergence of sense data and perceptions at a particular space-time locus, Kant thought, does not explain how it is possible that people or persons “exist.” Kant asserted that the unity or identity of a person is possible only if the unity of the person comes from within, so to speak, rather than from without. Stated otherwise: it would not be possible to speak of person's having a collection of experiences or perceptions if one could not talk or think of an entity—a person—who receives and organizes and orders the experiences that he or she “has.” (While it is true that knowledge of the world does not come solely from within—thinking that would amount to a solipsism—it is also true that knowledge does not come solely from without.) As is well known, Kant thought that—insofar as we can tell—it is the person having experiences who supplies concepts or categories such as space and time, which are matters that make human experience conceivable, or possible. (These categories for experiencing the world lead in turn to the concept of causality. Human beings experience the world as a causally-ordered world.)

For a superb summary of Kant's philosophy see the entry for Immanuel Kant in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY*, *supra* note 31, at 398.

67. ARISTOTLE, *DE ANIMA* 412a line 29-412b line 6.

68. “Anima” is sometimes translated as “soul.” But this is plainly incorrect. “Soul” has the connotation of a substance separate from matter. And if there was one thing that Aristotle insisted on, it was that “anima” somehow inheres in matter and does not stand apart from it nor beside it.

69. See *id.* at 412a line 29 – 412b line 6.

70. See *id.* at 412b lines 17-19.

natural creatures) are self-organizing and self-regulating organisms was one of Aristotle's greatest contributions to Western thought and civilization. Aristotle's notion of "organism" has been enormously influential.⁷¹ Furthermore, despite its antiquity, Aristotle's view of the nature of the "animating principle"⁷² of a natural organism remains important today.

Aristotle's notion of self-organizing organisms has a close affinity with contemporary cutting-edge research and theorizing about matters such as human intelligence.⁷³ The notion that human creatures have an internal system of rules, principles, procedures, or operations that regulates, directs, or organizes their behavior and activity now has practically the status of a truism in a wide variety of disciplines.⁷⁴ It is generally thought that the task of research in fields such as cognitive science and neuroscience is not to determine whether or not such an internal operating system exists—whether some such set of self-organizing or self-animating rules, principles, or operations does or does not exist—but, rather, to determine the characteristics and attributes of the principles or operating systems by which animate organisms such as human beings regulate, control, and influence their activity.⁷⁵

71. Aristotle's notion of organism has influenced philosophers as diverse as Georg Wilhelm Friedrich Hegel and Alfred North Whitehead. See ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY: AN ESSAY IN COSMOLOGY* xi (David R. Griffin & Donald W. Sherburne eds., corrected ed. 1978). Aristotle's theory of organisms and of the makeup of the human animal are more than a matter of antiquarian or historical interest. Some of the modern world's most sophisticated students of matters such as mind, thought, and intelligence believe that Aristotle's theory of man and his psyche is essentially right. See PAUL FEYERABEND, *PROBLEMS OF EMPIRICISM* 12-15 (1981) (vol. 2, *PHILOSOPHICAL PAPERS*).

72. The word "anima"—as used by Aristotle—is probably best rendered as the "animating principle of living things." HENRY VEATCH, *ARISTOTLE: A CONTEMPORARY APPRECIATION* 60 (1974).

73. See Hilary Putnam with Martha Nussbaum, *Changing Aristotle's Mind*, in HILARY PUTNAM, *WORDS AND LIFE* 22 (James Conant ed., 1994) [hereinafter *WORDS AND LIFE*].

74. See JEAN PIAGET, *PSYCHOLOGY AND EPISTEMOLOGY* (Arnold Rosin trans., Viking Press, Inc., 1970); *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY*, supra note 31, at 619 ("The cognitive system of the adult is neither learned, in the Skinnerian sense, nor generically preprogrammed. Rather, it results from the organization of specific interactions whose character is shaped both by the features of the objects interacted with . . . and by the current cognitive system of the child . . .").

75. It is true that until fairly recently—until, roughly, the 1970s—some prominent theorists peremptorily dismissed the idea of anything remotely akin to a "psyche" or "soul" as metaphysical nonsense. If one were to use pseudo-Marxist language, one might say that such theorists dismissed terms such as "psyche" on the ground that the use of such language amounts to the "reification" of non-existent mental states. B.F. Skinner, the father of modern behavioral psychology, is probably the most renowned example of this "hard-headed," materialist, "anti-metaphysical" attitude. See B.F. SKINNER,

The idea that organisms "exist" and that they have the capacity to regulate or direct their behavior has little or nothing to do with the

SCIENCE AND HUMAN BEHAVIOR 283-294 (1953). Skinner asserts that "a self is simply a device for representing a functionally unified system of responses." *Id.* at 285. Skinner seemed to deny even the existence of "ideas." *See id.* at 252-254. Skinner referred to thinking as "the behavior of making a decision." *Id.* at 242.

Some of the logical positivists may have shared some of Skinner's views—though this is far from clear. For example, Rudolf Carnap, the "founder" of the school of thought sometimes called "logical behaviorism," occasionally seemed to deny the reality or existence of psychic or mental states. *See generally* RUDOLF CARNAP, *DER LOGISCHE AUFBAU DER WELT* (1928). *See also* RUDOLF CARNAP, *The Development of My Thinking*, in *THE PHILOSOPHY OF RUDOLF CARNAP* 3, 16-19 (Paul Schlipp ed., 1963) (volume IX of The Library of Living Philosophers series). *See also* RUDOLF CARNAP, *THE LOGICAL STRUCTURE OF THE WORLD & PSEUDOPROBLEMS IN PHILOSOPHY* 323, 339 (Rolf A. George trans., 1967); Rudolf Carnap, *Psychology in Physical Language*, in *LOGICAL POSITIVISM* 165 (A.J. Ayer, ed., 1959). But I think it is important to add that it is easy to misinterpret the logical positivists: I think their theories are often caricatured. My own recent re-reading of Carnap and some other logical positivists makes me think that it is a fundamental error to suppose that Carnap or any of the other logical positivists of his generation ever said or thought that "non-observables" are "illusions." What they generally did insist on was that theories and theoretical statements be empirically testable, which is not the same thing as saying that unobservable events do not "exist" or that statements about unobservable matters are "false" or "useless." Carnap did *not* believe that all "unobservable" nomological or law-like statements were useless illusions. In any event, Carnap himself denied that he ever intended to deny the reality of things such as mental states or law-like statements. *See* Rudolf Carnap, *Intellectual Autobiography*, in *THE PHILOSOPHY OF RUDOLF CARNAP* 3, 18-19 (Paul Schlipp ed., 1963) (volume IX of The Library of Living Philosophers series).

There are some important theorists who even now seem to be carrying on a Skinner-like campaign against the "reification" of supposedly unreal mental states or entities. *See* PAUL M. CHURCHLAND, *THE ENGINE OF REASON, THE SEAT OF THE SOUL: A PHILOSOPHICAL JOURNEY INTO THE BRAIN* 187-226 (1995). But the location of the battlefield seems to have shifted. For example, despite his persistent efforts to deny the reality of "mental states," Churchland emphasizes that the human animal is a self-organizing entity. Moreover, "behaviorist" and "physicalist" theories such as those of B.F. Skinner now strike many informed observers as either dogmatic or naive. The change in attitude is perhaps best exemplified by Hilary Putnam. Putnam is a prominent contemporary theorist who openly acknowledges the shift in his own thinking about the question of the reality or unreality of matters such as mental states. *See* Hilary Putnam, *WORDS AND LIFE*, *supra* note 73, at 428 (James Conant ed., 1994) ("A doctrine to which most philosophers of science subscribe (and to which I subscribed for many years) is the doctrine that the laws of such 'higher-level' sciences as psychology and sociology are reducible to the laws of lower-level sciences—biology, chemistry—ultimately to the laws of elementary particle physics. Acceptance of this doctrine is generally identified with belief in 'The Unity of Science' (with capitals), and rejection of it with belief in vitalism, or psychism, or, anyway, something *bad*. In this paper I want to argue that this doctrine is wrong.") The shift in intellectual perspectives has been most striking in the field of psychology: cognitive psychology is now considered to be at the cutting edge and behaviorism is a pale shadow of its former self. Much of the work done in the field of cognitive science would be altogether incoherent and insensible if it were true that "logical operations" do not really "exist" or do not "operate" somewhere or somehow within the human organism.

notion of a disembodied soul, an entity that is viewed as being somehow separate from "matter," "material," or something of the sort. Aristotle thought of "soul" or "psyche" as a kind of quality or attribute of the things that we call organisms. The Aristotelian view that the human psyche consists of a kind of indwelling logic or reason may have seemed "quaint" for a time. But if that was ever the case, it is no longer so. Today—in the day and age of the computer—theorists routinely assert or assume that it is not possible to describe the human organism without describing its internal structure—including—or especially including—the *logic* of its internal parts and workings and operations.⁷⁶

Today it is common to hear it said that it is impossible to understand the workings of the brain simply by grasping the physical material out of which the brain is made; one must instead understand the functional architecture of the brain—how the arrangement and relationship of the various material parts of the brain serve to make or allow the brain to perform certain operations or follow certain orderly and ordered procedures or logical patterns.⁷⁷ Although the claims and hopes of some of the early proponents of "artificial intelligence" were inflated, it is not entirely illegitimate to analogize human character to a computer's "operating system." How a computer—and a person—acts or behaves depends, of course, in part on the material ingredients—nuts, bolts, hands, eyes, teeth, wires, and so on—of which that computer or person is composed. But neither the behavior of a computer nor the behavior of a person can be described solely by describing that computer's or person's material or physical "parts." Moreover, it would be ludicrous to try to describe the behavior of a computer by attempting to describe its "propensities," "inclinations," or "tendencies." The only truly *informative* description of the behavior of a computer is one that describes the logic by which the computer operates—the description that captures the computer's "operating system." The same is almost certainly true of descriptions of the behavior of people.

The *only* reason that a description of a person's dispositions or tendencies *ever* works—the only reason that such a description ever "says" anything about a person's likely behavior—is that either the

76. See ZENON W. PYLYSHYN, COMPUTATION AND COGNITION: TOWARD A FOUNDATION FOR COGNITIVE SCIENCE 1-21 (1984).

77. John Haugeland refers to this notion as the idea of "medium independence." HAUGELAND, *supra* note 2, at 58. He says, "Formal systems [of which the mind may be an instance] are independent of the medium in which they are 'embodied.' In other words, essentially the same formal system can be materialized in any number of different media, with no formally significant difference whatsoever. This is an important feature of formal systems in general; I call it *medium independence*." *Id.* (emphasis in original).

person providing the description or the person receiving it implicitly provides or infers the rules and operations that "cause" the described disposition or tendency. There *must* be *some* rule or principle or set of rules or principles that "generates" the disposition. Otherwise there is no basis for making judgments about when—under what circumstances—the disposition in question might swing into action.⁷⁸ A disposition or pattern of behavior is often (though not always) a reflection or expression of a set of internal principles and operations.⁷⁹

In the course of this discussion of the nature of human character I have mentioned Aristotle and other "worthies." I do not invoke such worthies in order to "prove" that human beings are self-organizing beings who have an internal structure or logic that influences and directs their behavior. I mention such eminent philosophers, theorists, and scientists principally to give solace and reassurance to any people who may wonder if they should trust their own intuitions and common sense judgments about human character. Our intuitions and common sense tell us that there is within each one of us some set of principles and operations—some kind of a structure or "logic"—that influences how we behave.⁸⁰ There is no good

78. My argument implies that prior *dissimilar* conduct can, in principle, be as probative as prior similar conduct. The only important question is whether the prior conduct reveals something about a person's character that sheds light on the probability that the person might do a particular act. Thus, on my line of reasoning, to show that a defendant probably killed a priest, it might well be appropriate to show that the defendant destroyed the priest's garden or ripped up religious vestments of that cleric's religion.

79. By suggesting that conscious thought influences action I am making a claim that is inconsistent with the views of some students of "cognitive science." Some cognitive scientists assert that the thoughts and impressions available to us in our own examination of our selves are really apparitions and that only a deeper set of principles, not available through introspection, is the only thing that "actually" guides and directs the activity of the human organism. Paul Churchland, for example, seems to take such a view. He seems to believe that consciousness is an epiphenomenon and that the functional rules governing human behavior are *precisely* like the codes that underlie the "behavior" of some (as yet uninvented) computers. See PAUL CHURCHLAND, *ANEUROCOMPUTATIONAL PERSPECTIVE: THE NATURE OF MIND AND THE STRUCTURE OF SCIENCE* 55 (1989). ("[T]here is no problem at all in conceiving the eventual reduction of mental states and properties to neurophysiological states and properties.") Even Churchland, however, seems to think that in the interim—while we are awaiting the dénouement that computational science promises—we can and should rely on "folk" rules about the sources and causes of human behavior—sources and causes that folk wisdom asserts includes "conscious mental states." *Id.* at 1-2. ("We understand others, as well as we do, because we share a tacit command of an integrated body of lore concerning the lawlike relations holding among external circumstances, internal states, and overt behavior.")

80. Cf. Peter Tillers, *Mapping Inferential Domains*, 66 B.U. L. REV. 883, 916 (1986) ("The occasional value of constructs such as humor or wit cannot seriously be doubted. If

reason for anyone to doubt the soundness of such intuitions.

In April of 1997 the New York Times carried a report by Linda Greenhouse⁸¹ that illustrates the relevance of an individual's inner logic to behavior. The report discussed oral arguments before the Supreme Court in *Bracy v. Gramley*.⁸² The case involved a Chicago judge—Thomas Maloney—who took bribes from defendants in murder cases.⁸³ Judge Maloney presided at William Bracy's murder trial, but Bracy did not have the imagination or the guile to offer Judge Maloney a bribe.⁸⁴ Whether coincidentally or not, Bracy was convicted and sentenced to death.⁸⁵ After Judge Maloney's defalcations became known—Maloney was eventually convicted of taking bribes—Bracy sought to overturn his conviction. The case eventually made its way to the Supreme Court. The issue before the Supreme Court was whether Bracy had the right to conduct discovery for the purpose of trying to show that he had been denied the right to a fair trial before an impartial judge.⁸⁶

Bracy argued "the trial was fundamentally unfair because there was a substantial possibility that Judge Maloney was unduly harsh in the non-bribe cases to deflect attention from his leniency in the others."⁸⁷ "Justice Scalia," however, "said he thought it just as likely that rather than punishing those who did not pay bribes, a judge taking bribes to favor some defendants would be lenient in other cases as well to avoid calling attention to his behavior."⁸⁸ Greenhouse quoted Scalia as saying, "[Maloney] would look worse if

one understands how the witty mind of a particular person works, it is often possible to make some very good guesses about a person's behavior. Indeed, if one has no sense of a person's pattern of mental activity, one almost surely misses the person's jokes."). See also *id.* at 927-32 (discussing, *inter alia*, how an understanding of Ronald Reagan's mind and his sentiments and the like might improve inferences about Reagan's probable actions toward Nicaragua during his Presidency) ("Note that Reagan's logic, no matter how fuzzy, does not consist of mere dispositions and tendencies While it may be true that there are some instances where people simply have certain dispositions, it is also true that in most instances what we refer to as a disposition or propensity is a product of a belief system The difficulty involved in talking about human dispositions and proclivities is akin to the difficulty of explaining and predicting natural phenomena by talking about relative frequencies. Observed relative frequencies in both the human and natural context convey significant information only to the extent that an observer has some sense of the logical scaffolding on which such frequencies are constructed.").

81. Linda Greenhouse, *Justices Consider How the Taint of a Corrupt Judge Should Be Measured and Remedied*, N.Y. TIMES, April 15, 1997, at A18.

82. 117 S.Ct. 1793 (1997)

83. *Id.* at 1795.

84. *Id.*

85. *Id.*

86. *Id.*

87. Greenhouse, *supra* note 81, at A18.

88. *Id.*

he were a hanging judge in most cases and a bleeding heart in some.”⁸⁹

The contrasting views of Bracy and Scalia about how Judge Maloney might have reasoned about his treatment of defendants who failed to pay bribes illustrate my thesis about the relevance and probative force of the “internal operating systems” of human beings on their conduct on particular occasions. Bracy and Scalia disagreed about how Judge Maloney probably thought and felt about the risk of detection. But Bracy and Scalia both implicitly agreed that Judge Maloney’s thoughts and feelings about the risk of detection must have influenced Maloney’s treatment of defendants who did not pay bribes. Bracy’s reading of Judge Maloney’s “internal operating system” supported one hypothesis about Maloney’s probable treatment of Bracy while Scalia’s musings about Maloney’s thoughts and feelings supported a rather different hypothesis about Maloney’s behavior at Bracy’s trial. But Bracy and Scalia both assumed that the nature of Maloney’s thinking was pertinent to the question of how Maloney acted at Bracy’s trial.⁹⁰ They were entirely right.

Conclusion: Unresolved Issues

I have argued that the current character evidence rule is an unstable halfway house between (i) a legal regime that altogether prohibits the use of character to show the doing of an act and (ii) a system of proof rules that operates on the premise that a person’s mental and emotional makeup is a powerful indicator of behavior which the law cannot afford to abandon. Nonetheless, it is premature to assert that the law should now abandon the remnants of the prohibition against the use of human character to show conduct. It is true, I think, that the prohibition against circumstantial character evidence is more fiction than fact. It is also true, I think, that the character evidence rule, as porous as it already is, is gradually

89. *Id.*

90. Justice Scalia’s comments during oral argument about how Judge Maloney might have reasoned were intended to question Bracy’s argument that he should be permitted to gather evidence about Judge Maloney’s “motivations.” On my premises, however, Bracy has the better argument. No abstract model of deliberation, reasoning, or cognitive processes can show how a particular person—Judge Maloney—thought and felt about a matter such as the risk of detection. People, judges, and, even corrupt judges can be and often are quite different; they can have and often do have very different inner worlds or internal operating systems. Hence, if we wish to guess, or infer, how a particular individual or judge thought and felt, it is plainly helpful to gather and analyze *evidence* bearing on that individual’s inner world. The Court did in fact eventually rule—unanimously—that Bracy did have a right to conduct discovery in an effort to substantiate his hypothesis about Judge Maloney’s treatment of criminal defendants who failed to pay bribes. See Bracy, 117 S. Ct. 1793.

becoming yet more porous. It is even possible that the character evidence rule is headed towards oblivion. Nonetheless, I am not yet sure that oblivion is where I want the character evidence rule to go. This is only partly because I recognize the justice in the observation that the incoherence of the character evidence rule is an insufficient justification for abolishing the rule. We need to pause before performing radical surgery on the remnants of the character evidence rule because the use of character evidence presents risks that have not yet been adequately studied. I think that the standard justifications for a prohibition against circumstantial character evidence are unconvincing. Nonetheless, the use of character evidence may be dangerous or unwise for other reasons.

If it is true that human character is the animating spirit or operating system of a human organism, there are two or three features of human character that suggest that the use of character evidence in adjudication is problematic. The first is the *complexity* of the internal system of rules and principles that regulate human conduct. The second is the *deep* and *tacit* nature of many of the internal principles and operations that regulate the behavior of human beings.

The complexity of the human operating system raises some obvious questions. The first question is whether the complexity of human character generally or necessarily renders partial or fragmentary information about human character entirely or largely worthless.⁹¹ The second question is whether the amount of evidentiary detail that is necessary to do justice to the complexity of human character is so great that it is unaffordable.

The tacit nature of much human character and the tacit nature of much *knowledge* of human character present an additional array of issues.⁹² The first question is whether it is possible, in the courtroom, to generate the kind of tacit (but genuine) knowledge of character

91. Although it may be correct to say that it is necessary to have a lot of character evidence to understand character well, it does not follow that a little evidence of character is always worthless or (worse yet) always worse than no character evidence at all. An ordinary trier of fact is astute enough to realize that fragmentary evidence may have to be discounted. It is possible, moreover, that even fragmentary information about character can provide an observer with a clue about the (complex) makeup of a person. It should not be forgotten that we can and do use background or default assumptions when we have few details. For example, in the absence of further details, and knowing only that the defendant previously raped a little girl, we are perhaps entitled to guess that this child abuser thinks and feels the way that we believe most other child abusers think and feel.

92. Much human knowledge in general is tacit. See MICHAEL POLANYI, *THE TACIT DIMENSION* (1966). It seems clear that much knowledge of character is also tacit or implicit rather than explicit.

that people sometimes attain as a result of their ordinary interactions with people such as family members and friends. My view is that this is almost certainly not possible.⁹³

If I am right about the improbability of significant tacit learning by the trier of fact about the character of witnesses and parties on the basis of the trier's observations of the courtroom behavior of witnesses and parties, the next question is whether it is possible, in principle, for a trier of fact to acquire meaningful information about an internal operating system whose operations are so tacit and deep that the person in whom that operating system resides may himself not have a very good understanding of its nature.⁹⁴ Can reliable or useful character evidence be generated in a formal judicial setting such as a trial in which parties, witnesses, and triers do not act or interact "naturally"?

It is possible that the answer to this second set of questions is "yes." In particular, it is possible that the trier of fact can acquire significant knowledge about the character of witnesses and parties the way a biographer does—by acquiring and studying large collections of details about the people whose character and behavior are in question. Suppose that this is so. The tacit, or submerged, nature of human character may then join forces with the complexity of human character to present a third riddle about the value of character evidence.

Is it possible that our system of litigation and proof is so contentious and so coarse, and the human internal operating system so complex and submerged, that it is just not possible for our system of litigation and proof to produce reliable verdicts about a matter so subtle and complex as human character?⁹⁵ The American system of

93. The courtroom is generally a singularly inappropriate venue for the acquisition of tacit knowledge of human character. Participants in the American system of litigation and adjudication—I have in mind participants such as witnesses and parties—are taught to act in highly stylized ways, which makes it difficult for triers of fact to use informal behavioral cues to acquire reliable information about the internal operating systems of such courtroom participants. A courtroom setting is an "artificial" setting and, thus, even if the person whose behavior is to be assessed is in the courtroom, the behavior of that person will be artificial and it probably will therefore not convey any useful information about that person's character to the trier or triers of fact.

94. The argument that the attainment of such knowledge in the courtroom is in principle impossible might begin with the premise that practically all good knowledge of human character is acquired primarily as a result of interactions between the observer and the actor or as a result of the observer's direct observation of the actor's behavior (an actor such as a child or a friend). In this process it is possible that neither the actor nor the observer can explicitly describe what either of them believes the actor's character to be. If so, it is arguable that it is not feasible to make accurate determinations in a courtroom setting about the character of any person.

95. The problem I am trying to pose is acute. I am assuming that "deep character"—

litigation and proof is both contentious and adversarial. One astute scholar felicitously refers to this system as a "super-adversary system."⁹⁶ Is it possible and probable that large amounts of character evidence—such as detailed life histories—are peculiarly and excessively susceptible to manipulation and distortion in an adversary and contentious system of litigation and proof such as ours? In short, is it the case that large amounts of character evidence—detailed personal histories, for example—are peculiarly susceptible to manipulation and that in our adversary and contentious system of proof otherwise nuanced evidence of human character—evidence, that is, of the complex internal operating system that we call human character—would surely be corrupted and degraded and that the necessary nuances about character would be obliterated in the heat of courtroom warfare?⁹⁷ This is a question that requires further study and investigation.

There is one last major question that the tacit nature of human character and the complexity of character suggest. It bears repeating that human character is elusive as well as complex. That is in part because character is deep within each one of us; that is, there are many components of character that are hidden from the immediate view of strangers and even of ourselves. This suggests a question of the utmost importance: Is it the case that meaningful—that is,

if we can grasp it—is very probative of behavior. But I am also suggesting that our contentious system of litigation may be incapable of generating accurate assessments of the internal operating systems—the internal "logic"—of human beings.

96. Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary Oriented Approach* 49 HASTINGS L.J. ____ (1997).

97. The question in the text presents the related question of whether detailed evidence of character is any more subject to distortion and manipulation than any other kind of evidence. Many students of evidence and inference believe that all rational judgments about evidence are in some sense "subjective" or "personal." See Glenn Shafer, *The Construction of Probability Arguments*, 66 B.U. L. REV. 799 (1986). Nonetheless, some legal scholars have drawn a distinction between hard facts and soft facts. For example, Mirjan Damaška once suggested a distinction between "external facts" (such as the speed of a car) and "internal facts" (such as knowledge) and he suggested that methods of proof for the two types of facts might also differ. See Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1085 (1975). See also 1 WIGMORE ON EVIDENCE, *supra* note 5, § 1 n. 1, at 3-6 (reviser's extended discussion of the question of a possible difference between different kinds of factual questions and a possible difference in the degree of their hardness or objective ascertainability). If one takes the position that conclusions about human character are "soft facts" rather than a "hard facts," the thesis that character evidence is particularly dangerous because it is particularly vulnerable to manipulation and distortion may seem to gather some force. But the argument that questions about human character are soft may prove too much. For if questions about character are soft, so are questions about matters such as intent and knowledge. Yet the law routinely allows and requires the submission of evidence about issues such as intent and knowledge.

detailed—evidence of character must peer so deeply into the human heart and soul, into the inner recesses of the mind and soul, that such evidence ought to be regarded as so demeaning and degrading that such evidence ought to be prohibited for that reason alone? There are obvious differences between the nightmarish sort of inquisition portrayed in Arthur Koestler's *Darkness at Noon*⁹⁸ and the sort of "inquisition" that would occur if parties in American trials were allowed to submit detailed life histories of witnesses, parties, and other actors. Nonetheless, serious attention needs to be given to the possibility that the mere use in litigation of some kinds of character evidence might so expose the inner recesses of people's hearts and souls to public view that the use of such evidence should be prohibited—perhaps by the "character evidence rule."⁹⁹

98. ARTHUR KOESTLER, *DARKNESS AT NOON* (Daphne Hardy trans., 1941).

99. Evidence scholars need to devote much more thought than they have to the possibility of a connection between the character evidence and the "policy" of preventing unnecessary human degradation. They should consider the possibility that the character evidence rule impedes or should impede the use of evidence about the inner recesses of the human soul. They need to pay some attention to the possibility that the mere use of evidence such as detailed life histories degrades the dignity of the person whose inner recesses are exposed. They need to consider the possibility, for example, that the degradation that Rubashov suffered in Koestler's *DARKNESS AT NOON*, *supra* note 98, was attributable, not primarily to the physical punishment and correction that Rubashov suffered at the hands of his inquisitor, but principally to the fact that Rubashov's deepest feelings, fears, and beliefs became known to an official inquisitor.